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ABSTRACT

The Congressional Research Service prepared this compilation of articles and bibliography to facilitate student research on the regulation of mass media in the United States, the 1979-80 intercollegiate debate topic. The selection of articles reproduced in Section A and the citations chosen for the bibliography in Section B are representative of the wide range of subjects and viewpoints encompassed by the topic. Section B's annotated bibliography is divided into three parts to accommodate the topic. Part 1 contains sources which emphasize the controversy surrounding the regulation of the broadcast media, while part 2 consists of annotated citations drawn from sources dealing with the printed media. Part 3 includes the remaining forms of media, including film, satellites, and data transmission. Two other sections of the book provide instructions on how to secure additional information on the regulation of the mass media, and a list of available government publications that relate to the 1979-80 intercollegiate debate topic. (RL)

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Should the Federal Government Significantly Strengthen the Regulation of Mass Media Communication in the United States?

Intercollegiate Debate Topic
1979–1980

Pursuant to Public Law 88–246

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PUBLIC LAW 88-246, 88TH CONGRESS, S. 2311, DECEMBER 30, 1963

AN ACT To provide for the preparation and printing of compilations of materials relating to annual national high school and college debate topics

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Librarian of Congress is authorized and directed to prepare compilations of pertinent excerpts, bibliographical references, and other appropriate materials relating to (1) the subject selected annually by the National University Extension Association as the national high school debate topic and (2) the subject selected annually by the American Speech Association as the national college debate topic. In preparing such compilations the Librarian shall include materials which in his judgment are representative of, and give equal emphasis to, the opposing points of view on the respective topics.

SEC. 2. The compilations on the high school debate topics shall be printed as Senate documents and the compilations on the college debate topics shall be printed as House documents, the cost of which shall be charged to the congressional allotment for printing and binding. Additional copies of such documents may be printed in such quantities and distributed in such manner as the Joint Committee on Printing directs.

Approved December 30, 1963.

FOREWORD

The intercollegiate debate topic for the academic year 1979–80 selected by the Committee on Intercollegiate Debate and Discussion of the Speech Communication Association is

Resolved, That the Federal Government should significantly strengthen the regulation of mass media communication in the United States.

The Congressional Research Service has prepared this compilation of articles and bibliography on the debate topic proposition in compliance with Public Law 88–246. These materials are not intended to provide exhaustive coverage of the subject but only to furnish debaters with a start on their own research. While the articles and references have been chosen to represent a range of views and a variety of approaches to the problems raised by the topic, their inclusion does not imply any kind of approval or disapproval or recommendations on line of argumentation by the Congressional Research Service. The coordination and final selection of articles and citations in this document was the responsibility of Angele A. Gilroy, Analyst in Industrial Organization in the Economics Division. Steven Rutkus, Analyst in the Government Division, Edith Cooper, Analyst in the Science Policy Research Division, and Legislative Attorneys David Siddall and Robert Burdette in the American Law Division, were responsible for selecting references in their fields of expertise. The bibliography is drawn in part from the CRS Bibliographic Data Base with the assistance of Felix Chin, Senior Bibliographer, Library Services Division.

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Gilbert Gude,
Director, Congressional Research Service.

INTRODUCTION

This document is designed to facilitate research on the 1979–80 intercollegiate debate topic, Resolved: That the Federal Government Should Significantly Strengthen the Regulation of Mass Media in the United States. The selection of articles which have been reproduced in Section A and the citations which have been chosen for the bibliography which follows in Section B are representative of the wide range of subjects and viewpoints encompassed in this far-reaching topic. Section B's annotated bibliography is divided into three parts to accommodate the topic. Part 1 is comprised of sources which emphasize the controversy surrounding the regulation of the broadcast media, while part 2 consists of annotated citations drawn from sources dealing with the printed media. Part 3 includes the remaining forms of media which fit neither in the broadcast nor printed media categories, such as film, satellites and data transmission. Because of the interrelationship between the forms of media there may be overlapping discussions in the various references; selections were categorized on the basis of the major emphasis within each.

In using this document, two points of caution should be noted. While the selections were chosen to reflect an over-all balance on the debate topic, any specific entry may represent a single point of view. Therefore, the researcher is responsible for determining the objectivity of each item. Secondly, while we have attempted to be as careful as possible, the date of entry of each citation should be carefully considered. Because legal and regulatory developments in the media are under constant change, it is the researcher's responsibility to determine if opinions and statements reflect the present status of regulation.

CONTENTS

Page
Foreword v
Introduction VII
A. *Resolved:* That the Federal Government should significantly strengthen the regulation of mass media communication in the United States 1
  1. "Potomac Fever: Deregulating Telecommunications" by Donald C. Matthews 1
  2. "The Communications Act Policy Toward Competition: A Failure to Communicate" by G. Hamilton Loeb 4
  3. "The Power of the Press: A Problem for our Democracy" by Max Kampelman 60
  4. Statement by James K. Batten, group vice president/News, Knight-Ridder Newspapers to the Senate Select Committee on Small Business 93
  5. "A Fairness Doctrine Debate" by Richard Jencks and Robert Lewis Shayon. Afterword by Henry Geller 98
  6. "Affirmative Promotion of Freedom of Expression" a chapter in the System of Freedom of Expression by Thomas Irwin Emerson 111
  7. "The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification" in Michigan Law Review 159
  8. "An Economic Analysis of the FCC's Multiple Ownership Rules" by Allen Parkman 183
  9. "Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica" by Susan Wing 200
  10. "Regulation of Television Broadcasting: How Costly is the Public Interest'?" by Robert W. Crandall 229
  11. "FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics?" by Thomas L. Schuessler 238
  12. "'Deciding TV's Future" by Ida Walters 318
  13. "CATV and the Broadcasters" by Bill Flanagan 323
  14. "Television and the Young Viewer" by Eli A. Rubinstein 330
  15. "Children's TV: Sugar and Vice and Nothing Nice" by Peggy Charren 339
  16. "Compromise in Commercials for Children" by Scott Ward 345
  17. "The Censorship of Violent Motion Pictures: A Constitutional Analysis" by Mary B. Cook 354
B. Selected bibliography on the regulation of the mass media 372
  Part 1. Broadcast media 372
  Part 2. Printed media 397
  Part 3. Other forms of media (e.g., film, satellites, data transmission) 413
C. How To Secure Additional Information on the Regulation of the Mass Media 418
D. Available Government Publications Relating to the 1979–80 Intercollegiate Debate Topic 420

A. RESOLVED: THAT THE FEDERAL GOVERNMENT SHOULD SIGNIFICANTLY STRENGTHEN THE REGULATION OF MASS MEDIA COMMUNICATION IN THE UNITED STATES

Potomac Fever: Deregulating Telecommunications*

Limiting Federal bureaucracy and modernizing outdated regulations are long overdue in the communications industries, yet once the rules go, the public interest could become a victim of the profit motive

While Americans are being distracted by behavior-conditioning exercises such as odd-even gasoline lines, "Gong Show" announcements from the Administration about inflation and press discussion of the Doctor Strangelove premises of SALT II, a curious development has been afoot in Washington. In this preelection year, the communications subcommittees of Congress, members of the Federal Communications Commission and the White House's telecommunications policy advisers in the National Telecommunications Information Administration have all contracted *deregulatio nervosa* (the urge to deregulate), a fever that has swept the Carter Administration.

The fever really began a year ago when Representative Lionel Van Deerlin (D., Calif.), chairman of the House Communications Subcommittee, introduced "The Communications Act of 1978" (H. R. 13015), a radical proposal to deregulate broadcasting and the telephone and cable television industries. The Van Deerlin bill drew keen and critical attention from public-interest groups around the country because it proposed to eliminate the public trustee concept of communications regulation and to substitute for it the control exercised by the "free" play of forces in the marketplace. Media attention to the bill was scattered. Discussion in the press came largely as a result of prodding from public-interest groups that seemed to have a better sense of what the proposal would effect than reporters did.

Under existing law, as a condition for the right to use the public's airwaves, radio and television stations are licensed for three-year terms by the F.C.C. and are subject to Commission review when they apply for license renewal. Typically, the review includes an examination of a station's record of service to the local community, a random sample composite week of the kinds of programming offered, number of advertising minutes per hour, any record of public complaint filed with the Commission and station proposals for future program service, especially proposed weekly percentages of news and public affairs programming.

Broadcasters have always complained that these and other F.C.C. regulations are inhibiting, burdensome, unnecessary and expensive. Mr. Van Deerlin's proposals to all but end broadcasting regulation, however, brought hundreds of complaints from citizen groups around the country.

Mr. Van Deerlin expressed surprise at the furor he had created. He said removal of the public-interest standard had been "a political miscalculation." He announced that there would be a "rewrite of the rewrite" and went home to his politically secure San Diego district and reelection. Over on the Senate side, the chairman of that body's Communications Subcommittee, Ernest F. Hollings (D., S. C.), said that he, too, was thinking about revision of the Communications Act of 1934. He planned to introduce omnibus amendments to the law in 1979.

In March two bills were introduced in the Senate, one by Senator Hollings, "The Communications Act Amendments of 1979" (S. 611), and "The Telecommunications Competition and Deregulation Act of 1979" (S. 622), sponsored by the subcommittee's ranking minority member, Barry Goldwater (R., Ariz.). Shortly afterwards, Mr. Van Deerlin introduced his promised rewrite of the rewrite, "The Communications Act of 1979" (H. R. 3333), to the House. Those legislative initiatives were bracketed by deregulatory proposals to the F.C.C. from Henry Geller, head of the N.T.I.A., and an announcement on May 8 by the Commission that they planned to deregulate radio. On May 17, the F.C.C. also proposed "significant" deregulation of telecommunications carriers (telephone, cable, microwave relay, satellite data transfer systems, etc.).

What do observers of the communications scene in Washington make of all this fever to deregulate? Are the present Congressional initiatives to be taken seriously, or is this just another testing of the waters in the increasingly important confluence of politics and communications? Why have both the Administration and the Democrat-dominated (four of the seven commissioners) F.C.C. chosen to move for deregulation at the same time?

The Communications Act of 1934, the law that presently governs broadcasting and the telecommunications carrier industries, definitely needs revision if we are to deal with the next complex evolutionary step in what some call "the age of information." Written in the early days of Franklin D. Roosevelt's New Deal, the act simply carried forward the first serious attempt by Congress to deal with the phenomenon of broadcasting, the Radio Act of 1927. The 1934 act also consolidated regulatory responsibility for telephone and telegraph under an independent regulatory agency, the F.C.C. Since then, we have had an explosive growth in communications technology.

The Office of Technology Assessment, an advisory arm of the Congress established in 1972, is preparing a report on the possible social and economic effects of new communication technologies. The heart of the report, scheduled for completion next spring, is a series of "scenarios" based on the changes proposed in the Hollings, Goldwater and Van Deerlin bills. Washington observers wonder if the fast-paced legislative process (10-week hearings on the three bills began in mid-April) can afford the lawmakers sufficient time to weigh the policy consequences the office will present. The question, then, is not whether we will have a revised or new communications act, but when.

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*Donald C. Matthews in America, vol. 141, July 14, 1979 : 6–8. Reprinted with permission of American Press, Inc., 106 West 56th Street, New York, N.Y. 10019. All rights reserved. Copyright 1979.

All of the current bills contain policy provisions that would affect technological innovation and industry structures in communications well into the next century. The proposals would also affect anyone who has a telephone, television or radio; who subscribes to a cable television service, or who deals with a business, bank or hospital that uses any one of a number of existing electronic data transmission services. School systems, local and state governments would also be affected, along with major religious organizations and their churches and synagogues. (The Catholic Church is said to be the largest user of telephone services in the United States after the Federal Government.)

Despite this, national and local news media have all but quarantined the public from exposure to what Congress is now contemplating. There has been no coverage of the hearings on these bills. There has been no interest by news media in publicizing the frustration and anger of public-interest groups that those hearings have been confined to Washington. Last year Mr. Van Deerlin scheduled hearings in seven cities outside the capital. This year he says field hearings are unnecessary. He says he has heard what the public has to say. Apparently, he was unimpressed.

His new bill goes even further than H. R. 13015 in its deregulatory intent. It ignores the concerns expressed by those members of the public who managed to learn the dates, times and locations to participate in last year's field hearings, or who managed to pay their own way to Washington to testify there. The Senate subcommittee does not think field hearings are necessary at all.

The three bills now under consideration share a common assumption: Deregulation is the means to achieve a more competitive, diverse and efficient system in broadcasting and telecommunications. In broadcast communications, Representatives Goldwater and Van Deerlin would effect deregulation through radical means. Mr. Goldwater proposes to strip the F.C.C. of effective oversight power. Mr. Van Deerlin would replace the present F.C.C. with a new and smaller (5-member) regulatory body, the Communications Regulatory Commission, with sharply restricted functions. Both bills equate the public interest with unspecified consumer benefits that might accrue from the "free" play of marketplace economic forces. Senator Hollings's bill offers less sweeping changes in broadcast regulation. In it, the F.C.C. is retained with significant oversight authority. He would also keep the public-interest standard of the Communications Act of 1934 as the goal of service by both the industry and the F.C.C. Senator Hollings seems less sure than his colleagues that a laissez-faire broadcasting industry would automatically serve the public interest.

All three bills propose deregulation of telecommunications services. Representatives Goldwater and Van Deerlin would deregulate completely in 6 and 10 years respectively. Senator Hollings does not set a timetable. His proposal, unlike the others, spells out the mechanics of the deregulatory process and how the interests of the public and emerging competitors could be protected at each stage.

The broadcast provisions of the Goldwater and Van Deerlin bills would grant broadcasters the wish they had over 50 years ago before passage of the Radio Act of 1927: to have their technical and engineering squabbles settled by the Government at public expense while gaining the exclusive right to use a public resource, the airwaves, without accountability to the public interest.

Proposals in all three bills to deregulate telecommunications carriers also pose serious questions for consumers. Will deregulation really increase competition to benefit consumers, or will the large established carriers (A.T.&T., I.T.T. and RCA) use their enormous technical and financial resources to dominate the new fields they would be allowed to enter and thereby leave consumers at the mercy of a few giant conglomerates? How will competitive rates affect the availability of existing and new communications services for the poor, small businesses and nonprofit users? Should we abandon regulatory procedures and protections developed out of the experience of over a century? Senator Hollings would swing the regulatory pendulum back to the days before the New Deal. Mr. Van Deerlin would return us to the big trusts era of the 19th century.

In a sense, the specifics of deregulation in the proposals of the three bills are almost irrelevant. What is noteworthy is the overall similarity of the Hollings, Goldwater and Van Deerlin bills in their telecommunications carrier provisions. Recent developments in the Congressional hearings indicate that both subcommittees could agree on those carrier provisions more rapidly than on the broadcast proposals of Representatives Goldwater and Van Deerlin. This could mean separate passage of those carrier provisions with the silent support of over-the-air broadcasters who would receive their deregulatory dividend piecemeal over the next few years from the F.C.C.

Meanwhile, public-interest advocates point out that the airwaves are not the airlines and that the sophisticated information networks created by the telecommunications giants under existing Government regulation cannot be compared to the interstate trucking industry. Deregulation of broadcasting and telecommunications would be a qualitatively different step for the Congress to take, they say. They are alarmed at the apparent haste to enact such important legislation.

'Even if one concedes the validity of the F.C.C. and N.A.B. data, the question of news quality remains. . . . How will profit incentives be insulated from editorial judgment on content? One can envision radio news that would make some of our . . . supermarket weeklies look sedate'

Executive branch activity in the communications field has also been note-but-not-newsworthy. In recent months, Henry Geller, head of the National Telecommunications Information Administration (N.T.I.A.), has been recommending that the F.C.C. deregulate radio, change the electromagnetic "spacing" of AM radio stations to permit more channels and a general reappraisal of the existing communications regulatory structure. The recently created N.T.I.A. serves as the President's principal adviser on telecommunications policies and regulation.

Mr. Geller is an old Government and Commission hand. He feels the F.C.C. just doesn't work, that it has inhibited technological innovation and stifled diversity of service and freedom of expression in broadcasting. His theme in recent public speeches has been that it is impossible to get broadcasters to work against their interests. The marketplace forces of competition that would normally produce diversity, and so, greater freedom of expression, have been bridled by the politically unrealistic and socially idealistic insistence of the F.C.C. on a public-interest standard of broadcaster service that is both vague in statutory expression and arbitrary in Commission interpretation.

Mr. Geller's thesis is a curious blend of naive political realism and cynicism born of F.C.C. experience. As a former staff member, he is well aware of the Commission's historic tendency to mirror the wishes of the telephone and broadcasting industries simply because those industries have extensive, day-to-day contact with it. He is less ready to admit that the F.C.C., even in its better moments, has consistently viewed new developments in broadcasting and telecommunications from the economic perspective of established and entrenched interests.

In his recent statements, Mr. Geller also implicitly equates the success or failure of the regulatory system with how much change is effected through litigation or official Commission intervention. He seems to discount self-regulatory activity by broadcasters in the face of the threat of possible F.C.C. regulation of court-mandated directives. He also dismisses the hundreds of local community-broadcaster agreements privately arrived at in the broadcast consumer movement era that dates from the late 1960's. That era began when the Office of Communication of the United Church of Christ won a U. S. Court of Appeals decision that consumers were "parties in interest" in regulatory proceedings. That entitled them to file petitions to deny license renewal requests of broadcast licensees who allegedly failed to serve the public interest. This right would be taken away by the Goldwater and Van Deerlin bills. To his credit, Mr. Geller and his N.T.I.A. associates would like to see more effective public participation in F.C.C. rulemaking activities and even reimbursement of the costs citizen groups incur by participation in those proceedings. He would also aid the public when it comes to the most effective means of asserting citizen rights: intervention in licensing proceedings.

On May 8 the F.C.C. announced its intention to deregulate the nation's 8,400 radio stations. On the basis of staff reports of the plans and policy office, F.C.C. Chairman Charles Ferris said that a case had been made for "the uselessness of our rules." Mr. Ferris's statement reflects a study by F.C.C. economists that there is no need for radio stations to adhere to present Commission regulations that require a minimum of broadcast time (8 percent) to be set aside by AM stations for news and other nonentertainment programming. FM stations must set aside a minimum of 6 percent. According to the F.C.C. staff, most stations in large markets exceed those percentages.

The Interim Report of the DuPont-Columbia Survey of Broadcast Journalism, published in April, paints another picture. The report covers the 1977-78 broadcast season. Fewer than half the nation's radio stations listed news directors on their payrolls, according to the survey, which is based on staff research and reports from more than 90 broadcast market respondents across the country. Radio news, the report says, is related to station format. FM rock stations have almost no news. Their news departments consist of one or two persons, and there is minimal time and effort spent on news preparation. The emphasis is on music and commercial flow, as it is on so-called beautiful music and country-western stations. High-profile, top-40 stations try to make news a tune-in inducement and emphasize sex and violence, Hollywood gossip and police news. The report concludes: ". . . despite some bright moments . . . the situation in radio described by DuPont-Columbia correspondents was not heartening. Few reported any improvement in quality, several noted a conspicuous decline."

Even if one concedes the validity of the F.C.C. and N.A.B. data, the question of news quality remains. If marketplace competition and rating points are to be the spur that brings us more news, how will profit incentives be insulated from editorial judgment on content? One can envision radio news that would make some of our more sensational supermarket weeklies look sedate by comparison. Econometric models that predict "news flow" should make us as wary as those that miscalculated the rate of inflation this year.

Earlier this spring, White House watchers guessed wrongly that President Carter was going to endorse radio deregulation in his speech to the N.A.B.'s annual convention. Instead, the President flew to Dallas on March 25 with F.C.C. Chairman Ferris and reiterated his Administration's general commitment to deregulation as a means of stimulating economic growth. In response to a broadcaster's question about granting television and radio First Amendment rights parity with print journalism by removing fairness and political equal-time requirements, President Carter said the issues involved were "complex" and that he didn't think stations would be accorded that status. Now it seems the F.C.C. is ready to do the job. Commission action could trigger a court test.

Politics is not only the art of the possible, it is the art of doing the necessary thing when it becomes expedient and propitious to do so. A Democratic Administration beset by domestic economic problems, and sensing tremors in the always restless earth of the traditional Democratic Party coalition, may seek to persuade a Democratic Congress or the F.C.C. that now is the acceptable time to entrust the future of our information system to the beneficent breezes of the same corporate marketplace where the windfall profits in oil and gasoline now lie. The political and economic power of the communications industries is enormous. Wholesale deregulation could make them ungovernable. The fever to deregulate and the curious lack of interest in it by the news media should not be allowed to obscure what is at stake for the public in these complex issues. It is more than peanuts.

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THE COMMUNICATIONS ACT POLICY TOWARD COMPETITION: A FAILURE TO COMMUNICATE[*]

G. HAMILTON LOEB[1]

I. INTRODUCTION 2
II. THE LAW OF COMMUNICATIONS REGULATION: THE GENESIS OF THE COMMUNICATIONS ACT OF 1934 5
  A. *Federal Regulation Prior to 1934* 5
    1. *The Mann-Elkins Act* 6
    2. *The Transportation (Esch-Cummins) Act of 1920* 9
    3. *The Willis-Graham Act* 12
  B. *The Communications Act of 1934* 16
    1. *Development of the Communications Act* 16
    2. *The Telecommunications Provisions of the Act* 20
III. THE ORTHODOX VIEW: CREATION OF A NEW REGULATOR 22
  A. *The Legislative History* 23
  B. *The Policy of the Act* 26
IV. "TRUE FAITH" AND THE 1934 MILIEU 30
  A. *The New Model* 30
  B. *The Legal Basis for the New Model* 33
    1. *Section 1: The Service-To-All Clause* 34
      (a) *The background of the service-to-all clause* 35
      (b) *Exploring the meaning of "service-to-all"* 38

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[*] G. Hamilton Loeb in Duke Law Journal, vol. 1978, Mar. 1978: 1–56. Copyright 1978 by Duke Law Journal, Duke University School of Law, Durham, N.C. 27706. Reprinted with permission. Originally published at 1978 Duke L.J. 1.

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[1] Research Assistant, Harvard Program on Information Resources Policy; B.A. 1973, University of Virginia. The author wishes to express his gratitude for the support of the Harvard Program on Information Resources Policy and for the assistance given by the many reviewers who commented on earlier drafts.

THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Rostow, *The Great Telephone Debate*, 192 TELEPHONY 64 (June 6, 1977) [hereinafter cited as *The Great Telephone Debate*].

Federal Communications Comm'n: Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) [hereinafter cited as *Hearings on H.R. 8301*].

2. *Fundamental Structural Change Under Section 215* 43
3. *The Legislative History* 45
4. *The Expression of the 1934 Milieu: The "Common Carrier Concept"* 50

V. CONCLUSION: COMMUNICATIONS LAW AND POLICY 55

I. INTRODUCTION

Beginning in the late 1960's with the *Carterfone*[1] and *Microwave Communications, Inc.*[2] decisions, the Federal Communications Commission (FCC) launched what has been described as a reformulation of telecommunications regulation.[3] By mandating the interconnection of independently produced peripheral equipment and by permitting specialized common carriers to compete with the AT&T long lines for intercity private line business, the Commission signalled a reorientation of the FCC's regulatory policy toward introducing new competition into the telecommunications market. It has been the FCC's view in these and subsequent proceedings that the public interest would best be served by opening the door to new providers of communications services. With some notable limitations,[4] it has pursued this policy since 1968, much to the dismay of some established actors in the telecommunications field.

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[1] Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968). In the *Carterfone* decision, AT&T sought to prohibit by tariffs the use of a privately manufactured device which connected the telephone land line system with mobile radio systems. AT&T contended that in view of its "responsibility to establish, operate and improve the telephone system, they must have absolute control over the quality, installation, and maintenance of all parts of the system." *Id.* at 424. The Commission held the imposition of the tariffs to be unreasonable, discriminatory and unlawful in that AT&T had made "no adequate showing that nonharmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsibilities." *Id.* at 424. The Commission further held that the tariffs had been unreasonable, unlawful and discriminatory since their inception and ordered that they be stricken and given no further effect. *Id.*

[2] Applications of Microwave Communications, Inc. (MCI), 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970). In the *MCI* decision, application was made by a small corporation to the FCC for permits to establish a microwave radio service for small business interoffice and interplant communications. Although such service was already provided by the established carriers, the proposed system would provide lower rates by means of party lines and half-time use. The FCC, acknowledging that it was "a very close case," nonetheless approved the application after concluding that there was a need for the system, that it would be technically feasible, efficient and reliable, and that the firm providing the service was financially qualified to construct and operate the service. *Id.*

The *MCI* decision was expanded by the Commission's recognition of a general category of "specialized common carriers" providing private line services and facilities. Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C.2d 870, *aff'd sub nom.* Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1976).

[3] *See, e.g.*, Comment, *FCC Regulation of Domestic Computer Communications: A Competitive Reformation*, 22 BUFFALO L. REV. 947, 962-84 (1973).

[4] *See, e.g.*, MCI Telecommunications Corp., 60 F.C.C.2d 25 (1976), *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 781 (1978).

This competitive reformulation has been in large part a response to the ferment taking place in the communications equipment market.[5] With increasing national prosperity and the explosion in telecommunications technology that has occurred since World War II, new and more sophisticated opportunities have arisen for accommodating the needs of the familiar mouth-to-ear forms of communication. Furthermore, a new range of capacities in data processing and computer technology has multiplied the possibilities for machine-to-machine communication. New forms of communications services have grown around these technologies. In turn, these new services and technologies have begun to merge with dynamic technical and service developments in the broadcasting and computer arenas to produce an integrated galaxy of "compunications" functions,[6] and it has fallen to the FCC to develop regulatory policies to deal with this regrouping. Part of the Commission's response has been to open to competition those segments of the compunications market that fall within its jurisdiction.

The Commission has developed this competitive policy by analyzing the possibilities for structuring the new options and consequences created by the post-World War II telecommunications ferment, and it has been for the most part the perennial political question of "who gets what, when"[7] which has informed this analysis. However, as with all regulatory actions by administrative agencies, this edifice of policy rests on a legal base. In the telecommunications area, that legal base is the Communications Act of 1934.[8] Although the Communications Act historically has presented few difficult questions of law that might limit the range of policy options open to the Commission in structuring compunications markets,[9] parties attacking the procompetition decisions have argued that there are specific policy directives in the Communications Act barring the FCC from acting in a manner that promotes competition, at least in the peripheral equipment and specialized common carrier fields.[10] The contention is that there are limits of *law* imposed on the policy discretion of the FCC.

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[5] The extent to which the new policy toward competition stems from changes in the Commission's composition or from political influences is beyond the scope of this Article. However, the FCC's course in this area has been fairly steady under both Democratic and Republican appointees and does not appear to be the product of one or another partisan philosophy.

[6] The term was coined by Anthony G. Oettinger in *Compunications and the National Decision-Making Process*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 74-113 (M. Greenberger ed. 1971). *See also* Berman & Oettinger, *Changing Functions and Facilities: The Politics of Information Resources*, 28 FED. COM. B.J. 227, 247-48 (1976). Alfred Kahn, then Chairman of the New York Public Service Commission, noted: "The overwhelmingly significant consideration about the future organization of telecommunications, so far as I can see, is the fact that its evolving technology is thoroughly demolishing the validity of the boundary lines we have been drawing across the face of the industry." *Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 95th Cong., 1st Sess. (1977), *reprinted in The Great Telephone Debate* 72-76. This merger of technologies has occurred in one form or another throughout the history of modern telecommunications; the computer-communications merger is only the latest manifestation. For example, even at the time the Communications Act of 1934 was passed, the process of technological merger was apparent, as can be seen in the remarks of Rep. Merritt on the House floor during debate on the Act: "It developed as the hearings [on the legislation] went on that by reason of improvements and inventions and the mechanical part of the service, telephone and telegraph and radio are becoming more and more interconnected, so that it is hardly possible to regulate one without regulating the other." 78 CONG. REC. 10316 (1934).

[7] H. LASSWELL, POLITICS—WHO GETS WHAT, WHEN, HOW (1936).

This Article will examine these questions about the governing law of telecommunications and compunications.[11] Part II describes the development of telecommunications regulation from the invention of the telephone in 1876 through the enactment of the Communications Act of 1934, focusing on the evolution of the federal regulatory structure and the substantive law which it has applied. Beginning with this basic historical framework, Parts III and IV undertake to outline and then analyze the two principal competing views regarding the mandate of the Communications Act toward the telecommunications market structure. Part III discusses the prevailing view that the FCC is free to exercise an essentially boundless discretion in overseeing telecommunications developments. Part IV explores a novel interpretation of the Act, advanced with increasing frequency by the established carriers and state regulators, which identifies provisions in the statute that would bar the FCC from permitting competition which threatens duplication of, or economic or technical harm to, the services and facilities of the monopoly shared by AT&T and the independent telephone carriers. Part V then draws conclusions about these two alternatives, suggesting that the single reliable lesson to be learned from studying the Communications Act is that Congress has failed to provide any useful guidance to regulators and courts faced with the critical job of allocating opportunities in a fluid, rapidly evolving compunications environment.

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[8] 47 U.S.C. § 151 (1970) (originally enacted as Act of June 19, 1934, Pub. L. No. 416, ch. 652, 48 Stat. 1064).

[9] *See, e.g.*, FCC v. RCA Communications, Inc., 346 U.S. 86, 93 (1953) (FCC's broad powers over communications not limited by federal procompetition laws).

[10] See text accompanying notes 149-250 *infra*; *Domestic Common Carrier Regulation: Hearings on H.R. 7047 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975) (statement of Eugene V. Rostow on behalf of AT&T); Brief for the National Association of Regulatory and Utility Commissioners (NARUC) at 29-41, Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976).

The attack on the procompetition policy is taking place in Congress as well as in the courts. *See House Panel Considers Major Overhaul of 1934 Communications Act*, 35 CONG. Q. 1113 (June 4, 1977). *Compare* Consumer Communications Reform Act of 1977, H.R. 8, H.R. 513, 95th Cong., 1st Sess. (1977) (designed to undo the *Carterfone-MCI* line of cases) *with* H.R. Res. 285, 95th Cong., 1st Sess. (1977) (expressing congressional approval of the procompetition developments).

[11] In dealing with the new competition doctrine, it is important to keep in mind the distinction between law and policy. The question at issue here is not which choice among available policies might optimize the structure and performance of the communications industry, but what limits on the range of those choices are imposed on the FCC by the terms of the Communications Act itself.

II. The Law of Communications Regulation: The Genesis of the Communications Act of 1934

Assessing the implications of the Communications Act with respect to competition in the telecommunications area is not easy. The Act is remarkable for its non-specificity,[12] and even the regulatory scheme for wire communications, which is laid out in more detail than that for broadcasting, provides no immediate answers to the problem. It is only by interpreting the legislative history and construing the statutory language that the national policy for telecommunications set forth by Congress in 1934 can be discerned. Although this process of historical interpretation can be haphazard, the task is nonetheless central in determining whether the FCC is authorized to act as it has in the policy-making sphere. The predominant view of the Act is that it was intended simply to centralize scattered regulatory authorities over portions of the communications industry in one body, the FCC, without significantly altering the substantive law or the established policies created under predecessor statutes.[13] Under this interpretation, the Act must be seen as mostly form and not substance, and the legislative enactments prior to 1934 from which it was composed become critical for deciding what policy was to be carried forward by the new Commission when it assumed power in 1934.

A. *Federal Regulation Prior to 1934.*

For the first seventeen years following the invention of the telephone in 1876, the Bell company monopoly on telephone service was protected under the patent laws.[14] When those patents expired in 1893-94, a new group of independent competitors, now free to make use of telephone technology, gave birth to a period of intense competition in local telephone services. This resulted in a massive increase in the number of telephones in service and brought the independents within close range of the Bell companies in total connections.[15] Within a decade of the expiration of the patents, AT&T began to use its superior financial and geographic resources to take over a large number of competitors and to make the going difficult for the rest by refusing to connect independents into its local and long-distance lines, which were becoming increasingly important as the availability of telephone service expanded. It was not until the Justice Department under President Wilson intervened in 1913 that this fierce competitive phase cooled,[16] and, until the latest stages of the post-patent competitive period, communications service remained practically unregulated by federal authority.[17]

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[12] *See, e.g.*, IV B. Schwartz, The Economic Regulation of Business and Industry 2374 (1973); L. Jaffe, Judicial Control of Administration Action 49 (1965).

[13] See text accompanying notes 110-48 *infra*.

[14] For the fascinating history of the invention of the telephone and the complex patent litigation it engendered, see Note, *The Law and the Telephone*, 50 Am. L. Rev. 425 (1916).

[15] Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 Law & Contemp. Prob. 340, 455 (1969).

1. *The Mann-Elkins Act.* Communications services were first brought under federal regulatory supervision by the Mann-Elkins Act[18] of 1910, which gave the Interstate Commerce Commission (ICC) jurisdiction over interstate rates charged by "telegraph, telephone, and cable companies."[19] The Act provided to parties aggrieved by rates charged for communications services the right to complain to the ICC, which then could investigate and, upon concluding that the rates were "unjust" and "unreasonable," declare the charge unlawful.[20] This incorporation of communication services into the jurisdiction of the ICC was accomplished by a sparsely explained addition to an act designed to regulate sleeping-car companies and other transportation carriers, thereby setting the tone for the regulation of communications services that lasted until the New Deal.

The process by which this came about seems from the record almost casual. The principal provisions of the Mann-Elkins Act, designed to redeem part of the Republican platform on which President Taft had been elected,[21] established a special Commerce Court for handling ICC appeals and expanded the power of the ICC over the railroads.[22] Neither the House Report[23] nor the Senate Report[24] that accompanied the respective versions of the bill to the floor in each chamber contained any reference at all to telephone or telegraph, and no proposal to consider telecommunications technology had been made during committee hearings.[25] The first mention in the record of regulation of telecommunications services did not occur until mid-way through the House debate on the railroad bill, when an amendment was offered to include "telegraph and telephone companies" within the definition of the common carriers to be regulated by the Interstate Commerce Act.[26] Its sponsor argued only that "there is no reason why these great instrumentalities of commerce should not . . . be put within the provisions of the interstate commerce act"[27] and that "these necessary instrumentalities which the citizens have to use, which are monopolies in their particular lines of business [should] be required to make reasonable charges";[28] at no point were any specific abuses cited in the House consideration of the amendment. Even Chairman Mann agreed that regulation of telephone and telegraph was "desirable,"[29] although he argued strenuously against the amendment being grafted onto the railroad-oriented bill amending the Interstate Commerce Act.[30] Despite Mann's opposition, the amendment was passed with relative ease after a short debate.[31]

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[16] This cooling came as the result of an agreement entered between the Justice Department and AT&T known as the Kingsbury Commitment, discussed in notes 59-61 *infra*.

[17] One caveat is in order. It is not entirely true that the federal government played no early regulatory role, although this is clearly the view which dominates the commentary on the early competitive period of the telephone. *See, e.g.*, Gabel, *supra* note 15. The federal courts in this era engaged in a roundabout form of regulation by using the fourteenth amendment protection of property aggressively to control state rate-setting bodies. *See* J. BAUER, TRANSFORMING PUBLIC UTILITY REGULATION 64-69 (1950); J. Sichter, Separations Procedures in The Telephone Industry: The Historical Origins of a Public Policy 11-12 (unpublished article distributed by the Harv. Prog. on Information Resources Policy, 1977). Sichter notes that the effect of this federal court intervention on early state regulation was "devastating." *Id.*

[18] Commerce Court (Mann-Elkins) Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 544 (1910) (amending Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379 (1887)) (provisions relating to telegraph, telephone and cable companies repealed 1934).

[19] Mann-Elkins Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 544-45 (1910) (provisions relating to telegraph, telephone and cable companies repealed 1934).

[20] *Id.*

[21] H.R. REP. No. 923, 61st Cong., 2d Sess. 1 (1910).

[22] See the discussion of the Mann-Elkins Act in II B. SCHWARTZ, *supra* note 12, at 1007-09.

[23] H.R. REP. No. 923, *supra* note 21.

[24] S. REP. No. 355, 61st Cong., 2d Sess. (1910).

The same procedure was followed, with a deceptive twist, during Senate consideration of the Mann-Elkins Act. Again, after no consideration of telephone and telegraph issues by the committee that reported the bill, the "Dixon amendment" was offered to bring "telegraph, telephone, and cable companies" within the jurisdiction of the Interstate Commerce Commission.[32] Its sponsor, misinforming the Senate that a similar provision had been reported unanimously by the House Committee and that it had passed the House without a division vote, echoed the generalized reasoning used in support of the amendment in the House: "the interstate telegraph and telephone companies are about the only remaining public service corporations engaged in interstate commerce that are not under the control of the Interstate Commerce Commission."[33] Again, the committee chairman presiding over the bill argued against its adoption, saying that the problems of communications should be considered separately and at more length than the Dixon amendment provided.[34] However, the amendment passed by a substantial majority.[35]

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[25] 45 CONG. REC. 5534-35 (1910) (remarks of Rep. Townsend).

[26] 45 CONG. REC. 5533 (1910) (remarks of Rep. Bartlett).

[27] *Id.*

[28] *Id.* Other supporters of the amendment were hardly more specific. ***See id.*** 5534 (remarks of Rep. Underwood) ("[W]e cannot afford to turn our backs on [the amendment] and refuse to bring the great telegraph and telephone lines in this country within the terms of the interstate commerce act, so that they may be properly and fairly regulated in the interest of the great commercial life of the Nation"); *id.* 5536 (remarks of Rep. Fitzgerald) ("[T]here is a persistent, a strong, and a reasonable demand throughout the country for some proper supervision of telegraph and telephone companies"); *id.* (remarks of Rep. Hobson) ("To leave them unregulated is to leave private corporations with the power to tax the people at will . . . . The whole domain of the distributing system in a great organism like a nation should be brought under the control of the regulating system—the Government").

[29] *Id.* 5533 (remarks of Rep. Mann).

[30] "[H]ow ridiculous it is to stick into the [bill] something which has nothing to do with either passengers or property. It amounts to nothing. It is an advertisement only of our own incompetency, of our incapacity for legislation." *Id.*

[31] *Id.* 5537. The final House vote was 109-76.

[32] The original version of the amendment, sponsored by Senator Dixon, ran over nine pages, although it did nothing more than reenact section 1 of the Interstate Commerce Act and add telephone, telegraph and cable companies to its purview. This caused some consternation among Senators who were being forced to vote on such a lengthy measure without having time to consider it, and a motion to table the Dixon amendment was made but defeated, 22-37.

When the conference report[36] returned to the Senate, no time was spent discussing the new proposal regulating communications services. Senator Elkins, in explaining the conference report, noted that "[i]t extends the principle of rate legislation which requires all rates to be just and reasonable and free from unjust discrimination to telephone and telegraph companies as well as to carriers,"[37] but the subject was not brought up again and the conference measure passed without a roll call.

Why the apparent consensus that telegraph and telephone companies should be regulated by the federal government had developed by 1910 is not clear from the record. There was some expression of populist sentiment,[38] some suggestion that rates had been set unfairly or even predatorily[39] and some indication that the proregulatory view that emerged during the Progressive era and first bore fruit in the regulation of interstate railroads was thought to apply automatically to communications carriers as well.[40]

Senator LaFollette then offered a simple substitute adding telecommunications companies to ICC jurisdiction, which was adopted by voice vote. *Id.* 6975-76.

[33] *Id.* 6973 (remarks of Sen. Dixon). No other Senator spoke in support of the amendment, although Senator Lodge expressed "no objection" to regulation of telephone and telegraph companies. *Id.* 6976.

There is one indication in the Senate debate of the source from which pressure for the amendment may have come. Senator Dixon inserted a letter from the National Independent Telephone Association accusing the Bell System of being an "unfair competitor" and using "outrageous methods of warfare" against the independents. The letter pointed particularly to discrimination in long-distance rates and below-cost pricing allegedly practiced by Bell to drive out competitors, and claimed that federal supervision would eliminate these wrongs. *Id.* 6973-74.

[34] *Id.* 6975 (remarks of Sen. Elkins). However, after a division vote indicating substantial support for federal regulation, Senator Elkins agreed to accept the LaFollette substitute.

[35] See note 32 *supra*.

[36] S. Doc. No. 623, 61st Cong., 2d Sess. (1910), *reprinted at* 45 Cong. Rec. 8134-42 (1910).

[37] 45 Cong. Rec. 8240 (1910) (remarks of Sen. Elkins).

[38] *See id.* 5536 (remarks of Reps. Hobson & Fitzgerald).

[39] *See id.* 6973-74 (letter from National Independent Telephone Association); *id.* 8240 (remarks of Sen. Elkins).

[40] *See id.* 5533 (remarks of Rep. Bartlett); text accompanying note 27 *supra*. One of the larger mysteries surrounding the Mann-Elkins telephone and telegraph amendments is the role

Perhaps the fact that the communications company amendment to the Mann-Elkins Act produced no real regulation of telephone and telegraph services in the twenty-five years the ICC had jurisdiction over telephone and telegraph companies[41] indicates that, whatever the guiding reasons may have been for extending federal authority to communications in 1910, no large wave of public sentiment demanded it. But why the ICC was to regulate the providers of interstate telephone and telegraph services is no more apparent from the congressional consideration of the problem than is the policy that the Commission was to follow in exercising its supervisory jurisdiction. The most that can be said is that whatever Congress had established in 1887 as the regulatory policy for nineteenth century barge and rail traffic was, after 1910, to apply to telephones and telegraphs as well, although this can only be inferred from the amendment of the Mann-Elkins Act and not found in any expression of the House or Senate as to what the regulatory scheme was to be.

2. *The Transportation (Esch-Cummins) Act of 1920.* The Mann-Elkins amendment to the Interstate Commerce Act remained the statutory authority for federal regulation of telecommunications for ten years.[42] In 1920, while developing legislation to return the railroads to private ownership from wartime government control, Congress revamped the Interstate Commerce Act to extend federal regulation of surface transportation even further through the Transportation (Esch-Cummins) Act of 1920.[43] The

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played by AT&T and its dynamic President, Theodore Vail. Not long before 1910, Vail began to defuse the Bell System's resistance to state regulation, suggesting that regulation could work to the benefit instead of the detriment of AT&T. *See* AT&T ANNUAL REPORT 14-18 (1907). See note 179 *infra*. Although it may appear unlikely that historical proximity between the emergence of Vail's proregulatory view and the 1910 amendments is coincidental, the historical evidence is silent.

[41] See text accompanying notes 82-84 *infra*.

[42] For twelve months in 1918-19, all wire communications facilities were taken over by the government as a war emergency measure. Although managerial control was placed in the Postmaster General and revenues were diverted to the Treasury, operation of the communications system remained effectively in the hands of the corporate executives of each company, and no new regulatory policy emerged. *See* Note, *The Telegraph Industry: Monopoly or Competition*, 51 YALE L.J. 629, 636 (1942).

> The wartime operation of the communications system might well have been an initial step towards a reasoned national communications policy. But in fact it was merely a brief, unrelated hiatus in the haphazard accumulation of *ad hoc* legislation made to substitute for policy. A few hours of cursory debate sufficed to hand over to the Executive all the country's facilities for rapid communication. Brief hearings followed by even less—as well as less relevant—debate marked the end of the experiment.

Id. Upon return of the communications companies to private control, telephone and telegraph service reverted to the regime of the Mann-Elkins amendments. Act of July 11, 1919, Ch. 10, 41 Stat. 157 (1919) (withdrawing government control of communications companies).

[43] Transportation (Esch-Cummins) Act of 1920, Pub. L. No. 152, ch. 91, § 400, 41 Stat. 474 (amending Mann-Elkins Act, Pub. L. No. 218, Ch. 309, § 7, 36 Stat. 544 (1910) (repealed 1934)).

Esch-Cummins Act, like the Mann-Elkins Act, was almost exclusively concerned with railroad issues; the statement of the policy of the Act[44] refers explicitly to rail and water transportation but makes no mention of communications.[45] However, at least one change—although perhaps only cosmetic—was made by the Esch-Cummins Act in the statutory language relating to communications services: the jurisdiction of the ICC over "telegraph, telephone, and cable companies" was restated to encompass "[t]he transmission of intelligence by wire or wireless."[46]

There is no discussion in the official record of this specific change in the jurisdictional language. In fact, the Senate report,[47] conference report,[48] and debate on the Esch-Cummins bill made no mention of communications at all. Only in the House were the problems of communications carriers addressed. The original version of the House bill had subjected communications companies to the full panoply of regulatory requirements aimed primarily at railroad carriers, including the acquisition of a certificate of convenience and necessity for extensions and abandonments, and a certificate for the issuance of stocks and bonds.[49] That part of the proposed legislation drew heavy opposition in the House hearings[50] and was subsequently dropped in the bill reported from the committee. The committee made it clear that no change in the regulatory scheme or the regulatory policy previously applied to communications was contemplated,[51] and this intent was reinforced by the exclusion of communications carriers from the broad statement of policy incorporated in the Act.[52]

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[44] Among the stated policies of the Act was the preservation of competition wherever possible. Esch-Cummins Act, Pub. L. No. 152, ch. 91, § 407, 41 Stat. 481 (1920) (repealed 1934). See text accompanying note 190 *infra*.

[45] "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Esch-Cummins Act, Pub. L. No. 152, ch. 91, § 500, 41 Stat. 499 (1920) (repealed 1934).

[46] *Id.* § 400.

[47] S. Rep. No. 304, 66th Cong., 1st Sess. (1919).

[48] H.R. Rep. No. 650, 66th Cong., 2d Sess. (1920).

[49] H.R. Rep. No. 456, 66th Cong., 1st Sess. 11-12 (1919).

[50] *Return of the Railroads to Private Ownership: Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess. (1919); *see, e.g.*, *id.* 2912 (statement of Edgar Clark on behalf of ICC) ("I am not prepared to say that there is at this time any pressing public need for extending the proposed legislation to the telegraph and telephone companies in the same manner and to the same extent that it is proposed to be extended for the railroads and other carriers aside from the telegraph and telephone companies"); *id.* 1812-13 (statement of F.C. Stevens on behalf of Independent Telephone Association) ("[T]he railroad industry needs fundamental legislation. The telephone industry does not. . . . [S]uch a statute is not needed at present for public protection. There has been no abuse"). The telephone carriers did not oppose regulation generally but urged that communications carriers be given separate consideration and a separate statutory title. *See id.* 1785 (statement of F.B. MacKinnon on behalf of Independent Telephone Association) ("The telephone business . . . should be given that same earnest study, that same careful consideration, that this committee has been giving for the past weeks to the railroad problem. Our problem, we say, is not pressing"); *id.* 1788, 1793-94 (statement of N.C. Kingsbury on behalf of AT&T).

[51] [T]he committee left the control of wire systems practically as it was under the

Given this relatively clear intent not to alter existing ICC regulation or, more accurately, nonregulation of communications carriers,[53] there is no justification for reading more than mere cosmetic significance into the restatement of ICC jurisdiction over the "transmission of intelligence by wire or wireless." The most likely reason for the change was simply to conform the statute to the scope of federal authority over interstate communications as delineated by the Supreme Court in the 1877 decision in ***Pensacola Telegraph Co. v. Western Union Telegraph Co.***[54] The ***Pensacola Telegraph*** case had been alluded to briefly in the Mann-Elkins debates by proponents of the Dixon amendment to include telephone and telegraph within ICC jurisdiction,[55] although no attempt had been made then to reword the floor amendment to incorporate the Court's language. The Esch-Cummins change therefore can most reasonably be read as an effort to match the legislative and judicial pronouncements in the communications area and to extend administrative authority over communications to the full reach of Congress' constitutional powers. By relating the statutory scheme for communications regulation to the expansive early definition of federal power over communications, the sixty-sixth Congress can be understood to have shown in the initial stages of federal communications regulation that the authority of regulatory agencies in the communications field was not to be narrowly confined to existing technologies or operations but was to reach as wide and deep as "progress" and "new developments"[56] carried it. In

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> interstate commerce act prior to Federal control. There was practically no demand for placing with added powers the wire systems under the commission. . . . [I]t was not thought wise at this time to complicate the solution of the railroad question with the peculiar problems connected with the regulation of wire systems.

H.R. REP. NO. 456, *supra* note 49, at 11.

[52] See note 45 *supra* and accompanying text.

[53] The House committee noted that by 1919 only "a half dozen cases" involving communications had been brought before the ICC. H.R. REP. NO. 456, *supra* note 49, at 11. See text accompanying notes 82-84 *infra*.

[54] 96 U.S. 1 (1877). The Court adopted a broad interpretation of the interstate commerce clause in light of the changes wrought by the telegraph on postal service:

> The powers thus granted [by the commerce clause and by the post office clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the *transmission of intelligence* are not obstructed or unnecessarily encumbered by State legislation.

Id. at 9 (emphasis added).

[55] 45 CONG. REC. 5537 (1910) (remarks of Rep. Cooper).

[56] *Pensacola Telephone*, 96 U.S. at 9.

this respect, the Esch-Cummins Act was of seminal importance in the evolution of communications regulation, even though it, like the Mann-Elkins Act ten years earlier, was passed with little or no consideration of the special aspects of the field.

3. *The Willis-Graham Act.* In 1921, Congress expanded federal authority over telecommunications by giving the ICC power to approve or disapprove consolidations and mergers of telephone and telegraph companies. At the same time, it exempted communications companies from the restraints of the antitrust acts once the ICC had determined that a proposed consolidation or merger would be "of advantage to the persons to whom service is to be rendered and in the public interest."[57] This reallocation of federal authority from the courts to the ICC, known as the Willis-Graham Act, was the first piece of legislation specifically targeted to the new and increasingly complex problems of telecommunications in the twentieth century and was the first detailed congressional consideration of the communications industry. It therefore takes on special importance in the legislative history of communications regulation.

The Esch-Cummins Act had authorized the ICC to exempt railroads from the antimerger laws upon a showing that consolidation of competing rail lines would be in the public interest, but because of general reluctance to alter the scheme of regulation that had been established through the Mann-Elkins Act it had withheld power to exempt acquisitions of communications companies.[58] As of 1921, therefore, communications carriers remained statutorily subject to antitrust suits. The Justice Department had come close to bringing one such suit during the crest of the period of intense competition between AT&T and the independent telephone companies, the process ending in the formulation of an agreement between AT&T Vice-President Nathan Kingsbury and Attorney General MacReynolds which required Bell to divest control of Western Union,[59] to interconnect independent lines with its own long-distance lines[60] and to refrain from purchasing or acquiring control of independent telephone companies operating in the same market as Bell system subsidiaries. Under the agreement, known as the Kingsbury Commitment,[61] AT&T remained free to purchase non-competing independent companies, and it did so in the period between the 1913 agreement and 1921, increasing its control from about fifty percent of telephones in service in 1910 to sixty-two percent in 1921.[62] However, as the decade of the 1910s evolved, independent companies who could not sell out to AT&T because of the Kingsbury Commitment or to competitors because of antitrust prohibitions suffered progressively worsening financial problems and began to seek relief from federal restrictions on consolidations. This effort culminated in the passage of the Willis-Graham Act, which provided an escape route from antitrust laws for financially pressed telephone companies[63] through the ICC.[64]

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[57] Act of June 10, 1921 (Willis-Graham Act), Pub. L. No. 15, ch. 20, § 1, 42 Stat. 27 (1921) (amending Transportation (Esch-Cummins) Act of 1920, Pub. L. No. 152, ch. 91, § 407, 41 Stat. 482) (repealed 1934)).

[58] See notes 50-51 *supra*.

[59] Bell had acquired control of Western Union in 1909. *See* J. BROOKS, TELEPHONE 133-34 (1975).

[60] During the early competitive era, Bell had aggressively used the leverage it gained from refusal to make long distance lines available to independents to force the competition out of business. The independents had attempted to establish a competitor long-distance system in 1899, but the financing for it failed. *See* Gabel, *supra* note 15, at 350, 353.

[61] Letter of N.C. Kingsbury, Vice-President of AT&T, to Attorney General J.C. Rey-

Unlike the Mann-Elkins and Esch-Cummins Acts, the Willis-Graham Act underwent some measure of deliberate congressional consideration. Joint hearings were held and the proposal received careful debate in the House.[65] It therefore contains the first indications of federal policy toward the communications market, and if Congress was not exactly clear on what the dimensions of that policy were, it is nevertheless true that the legislators expressed at least a "mood"[66] about what federal regulation of telecommunications was to involve. Since the provisions of the Willis-Graham Act were carried forward unchanged in the Communications Act of 1934 and

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nolds, *reprinted at* FCC, Report of the Investigation of the Telephone Industry in the United States, H.R. Doc. No. 340, 76th Cong., 1st Sess. 139-41 (1939).

[62] *See* J. Sichter, *supra* note 17, at 25 n.42.

[63] The two telegraph carriers established at the time of the Willis-Graham Act, Western Union and Postal Telegraph, were carefully excluded from the exemption provided for telephone carriers by the Act. It was not until 1943 that congressional authorization for a telegraph merger was granted. Act of Mar. 6, 1943, Pub. L. No. 4, ch. 10, 57 Stat. 5 (codified at 47 U.S.C. § 222 (1970)).

[64] As far as the official records are concerned, at least, it appears that the primary push for the Willis-Graham Act came from the independent telephone companies. *See* 61 Cong. Rec. 1983 (1921) (remarks of Rep. Winslow) ("The bill was brought to the attention of the committee by those representing a very large majority of the so-called independent telephone companies Many of them are skating on very thin ice"); *Consolidation of Competing Telephone Companies: Joint Hearings on S. 1313 Before House and Senate Committees on Interstate Commerce*, 67th Cong., 1st Sess. 9-11 (1921) (testimony of F.B. MacKinnon). AT&T maintained a studied neutrality on the bill. *See id.* 21 (testimony of C. Cole on behalf of AT&T)("We have no objection to the bill whatsoever. We are not proponents of the bill; we are not here advocating it"). Whether this reflected AT&T's off-the-record position is, of course, subject to some skepticism.

[65] *See Consolidation of Competing Telephone Companies: Joint Hearings on S. 1313 Before House and Senate Committees on Interstate Commerce*, *supra* note 64; 61 Cong. Rec. 1983-94 (1921). However, the committee reports are only two and three pages long and there was no Senate debate at all. S. Rep. No. 75, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 109, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1999 (1921) (Senate voice vote).

[66] *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (Frankfurter, J.) ("It is fair to say that in all this Congress expressed a mood . . . . As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application").

remain in force today as 47 U.S.C. § 221(a), it is particularly important to determine what that policy or "mood" was.

By 1921, the view was quite commonly expressed that telephone service fitted the definition of a natural monopoly and should be regulated and free from competition. The Senate Commerce Committee's flat declaration that "[t]elephoning is a natural monopoly"[67] was representative of this sentiment, as were frequent comments to that effect in the Willis-Graham debates.[68] That this view of the economic characteristics of telephone service was at the root of the policy enacted by the Willis-Graham Act is not subject to dispute. However, there are indications in the record of possible limits to the range of this policy, and these limits are central to establishing just how far the federal policy of natural monopoly reaches into the communications market.

The central practical problem facing the committees that drafted the Willis-Graham Act was the existence of dual and competing telephone systems serving individual local markets. As the House committee explained:

> Wherever there are such dual systems engaged in local business patrons of these telephone systems are put to endless annoyance and increased expense. In order to reach all the people using telephones, the telephone patron finds he must install two telephones in his house and office. This entails additional expense and usually results in inferior service over both systems.[69]

Although the Committee found "[t]here is nothing to be gained by local competition in the telephone business," it noted that "in about 1000 out of the 21,000 exchange points in the United States there are two local exchanges."[70] In the House debates, Representative Graham, the chief House proponent of the bill, elaborated:

> It is believed to be better policy to have *one* telephone *system in a community* that serves all the people . . . . There is nothing more exasperating, nothing that annoys the ordinary person more than to have two competing local telephone systems, so that he must have in his house and in his office two telephones . . . .[71]

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[67] S. Rep. No. 75, *supra* note 65, at 1.

[68] *See, e.g.*, 61 Cong. Rec. 1988 (1921) (remarks of Rep. Huddleston) ("Any man of observation is bound to recognize that there are certain natural monopolies . . . . There are monopolies which ought to exist in the interest of economy and good service in the public welfare . . . . The telephone business is one of these"); *id.* 1991 (remarks of Rep. Burton) ("They are natural monopolies. It is desirable that one consolidated organization should occupy one field").

[69] H.R. Rep. No. 190, 67th Cong., 1st Sess. 1 (1921). The Senate reached a similar conclusion. S. Rep. No. 75, *supra* note 65, at 1. For a contemporary echoing of this two-telephone dilemma as a paradigm of natural monopoly, see 2 A. Kahn, The Economics of Regulation 123 (1970).

[70] H.R. Rep. No. 190, *supra* note 69, at 1.

[71] 61 Cong. Rec. 1983 (1921) (emphasis added). See text at note 178 *infra*.

From these references in the record it appears most likely that the sixty-seventh Congress intended to create an explicit, promonopoly federal policy toward basic telephone service insofar as individual local communications markets were concerned. By clearing away the barriers to consolidation of competing systems, the Willis-Graham Act announced a recognition that the provision of telephone service facilities within a single exchange area was a natural monopoly which should be protected from the deleterious effects of competition.[72] The principal policy underlying the Act was that there should be available in each community one system through which all telephone users in that community can communicate. This does not automatically mean that where such universal and unified facilities are available, competition with regard to other telecommunications services cannot coexist compatibly with the local monopoly. But it does mean that what is familiarly thought of as local telephone service—the provision of facilities to route calls within an exchange area through lines radiating from switching stations—is to be preserved from competition.

That the local service monopoly should be the focus of the policy recognized by Congress in 1921 is of course no surprise. Telephone service at that time consisted almost exclusively of local exchanges. After the Kingsbury Commitment, AT&T's long-distance voice lines were interconnected with the independent local exchanges. Thus, it was the problem of unprofitable duplicative local services that drove the independents to seek refuge from the laws mandating competition. It also is not surprising, therefore, that long-distance service is hardly mentioned in the Willis-Graham record,[73] since no independent long-distance lines had ever competed successfully with AT&T's long lines.[74] Operating under a common and widely-held view of what the "telephone" was, and without reason to anticipate the sophisticated technology that would develop from the basic telephone apparatus, Congress was under no compulsion to elaborate on what the perimeters of the federal policy regarding the local telephone service were to be. Those perimeters were, no doubt, readily apparent to all in 1921.

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[72] On its face, the policy of Willis-Graham did not necessarily go so far. In the first place, the Act merely removed federal antitrust prohibitions against consolidations, and state public utility commissions were left with full authority to decide whether proposed consolidations were desirable. As a practical matter, though, it is apparent that state regulators were eager to consolidate if freed from antitrust restrictions. *See Consolidation of Competing Telephone Companies: Joint Hearings on S. 1313 Before House and Senate Comm's on Interstate Commerce*, *supra* note 64, at 32 (testimony of J. Benton for NARUC). Moreover, the ICC was allowed some measure of discretion in deciding which consolidations were deserving of exemptions. Although the language was changed by the committee from a simple authorization of a discretionary ICC grant to a mandatory certification of exemption once the "advantage to users" and "public interest" showings were made, *see* 61 CONG. REC. 1938 (1921) (committee amendments), the leeway inherent in those standards indicates that some possibility of dual systems remained where consolidation would not meet the "advantage" and "public interest" tests.

[73] The House Report refers to long distance services only once in passing. See text accompanying note 76 *infra*.

[74] See note 60 *supra*.

Nevertheless, it is impossible to conclude with assurance that the Willis-Graham telecommunications policy was limited solely to local competition in the provision of telephone facilities. The language of the Act itself contains no such limitation;[75] and the House report refers to the problem in passing as one of "dual and competing telephone systems, doing both local and long-distance business."[76] Moreover, within a year after its passage the Act was applied by the ICC to permit consolidation of long-distance competitors, apparently without objections from the opponents of the consolidation,[77] thus reinforcing the applicability of the Act's antitrust immunities beyond mergers of local competitors. Thus, while it is probable that Willis-Graham enunciated a monopoly-oriented tilt where local duplication of facilities was involved, the Act's more general policy implications remain too indistinct to provide meaningful guidance in cases which involve potentially duplicative private service systems or ones in which alternate suppliers compete for the responsibility of providing individual components of the unified service facility.

B. *The Communications Act of 1934.*

1. *Development of the Communications Act.* As demonstrated above, the Mann-Elkins, Esch-Cummins and Willis-Graham Acts were broad brush attempts to delineate a national policy with respect to the market structure and regulation of telecommunications. With Mann-Elkins and Esch-Cummins, Congress poured communications into the mold that had developed from, and continued to be concerned primarily with, transportation services. When faced with the problems of duplicative local exchanges, Congress turned special attention to communications carriers for the first time; nonetheless, the resulting Willis-Graham antitrust exemption again borrowed from existing transportation regulation, simply mirroring the exemption that previously had been allowed for railroads. The sum of these acts was a federal communications policy that went little further than the generalized assertion that telephone and telegraph carriers should be regulated and that geographically competing providers of basic mouth-to-ear telephone service should be free to consolidate. How the established regulatory authority was to operate was left to be analogized from railroad regulation, without congressional guidance as to its goals.

The post-1921 statutory scheme for communication common carriage regulation lacked not only an articulation of the aims which were to animate the regulators, but to a large degree it lacked a regulatory authority as well. In the first place, their usual railroad responsibilities kept the Interstate Commerce Commissioners overworked during this period, and the Esch-Cummins additions of new powers over railroads and water transportation service compounded the workload. But more important, even if the ICC had the time and personnel to devote to communications matters, the authority granted it over telephone and telegraph was, for the most part, illusory. The ICC was not empowered to initiate actions against telephone and telegraph companies on its own, a complaint from a disgruntled competitor or consumer of communications services was required before proceeding. While in the transportation area complaints were easily generated by the large amounts of money involved in challenges to railroad rates or practices, in the communications area few users had interests substantial enough to justify pursuing formal complaint proceedings.[78] The Commission could not require communications carriers to file rate schedules as it was authorized to require of railroad carriers.[79] It had no power to prescribe new rate schedules to replace rates found unjust or unreasonable, and it had no authority to require a certificate as a prerequisite to the expansion of communications facilities. In fact, the authority of the Commission to regulate any type of practice or classification beyond simple rates was in doubt.[80] The power to regulate communications granted the ICC by the legislation of 1910, 1920 and 1921 was "largely a paper authority."[81]

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[75] See note 57 *supra*.

[76] H.R. Rep. No. 109, *supra* note 65, at 1.

[77] Acquisition of Control of Northwestern Long Distance Tel. Co., 71 I.C.C. 530 (1922).

With no real policy to guide it, and no real powers to act through, the ICC exercised its jurisdiction over telephone and telegraph infrequently and with no enthusiasm. Only fourteen formal rate investigations were begun[82] and, with the exception of the introduction of a uniform accounting practice in the industry,[83] ICC regulation between 1910 and 1934 had no lasting impact on communications services, except insofar as it permitted unregulated private market forces to act without restraint. As one review of the period put it, "[t]he net result of regulation under the ICC may well have been to relieve the wire carriers of any effective governmental control in the public interest."[84]

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[78] Wheat, *The Regulation of Interstate Telephone Rates*, 51 HARV. L. REV. 846, 847 (1938); Note, *supra* note 42, at 632.

[79] During this period, the ICC "repeatedly urged the modification of the statute so as to require the wire carriers to file rate schedules." Note, *supra* note 42, at 632 n.26.

[80] *See* 60 CONG. REC. 8528 (1920) (colloquy between Reps. Esch and White during debate on Esch-Cummins bill).

[81] Note, *supra* note 42, at 632.

[82] Eight of the cases involved telegraph rates; four, telephone rates; and two, cable rates. *See* J. HERRING & G. CROSS, TELECOMMUNICATIONS 220 (1936). The ICC undertook some consideration of telephone depreciation charges and valuation of Western Union properties, but both investigations failed to reach a final stage before jurisdiction passed to the FCC in 1934. *See* Note, *supra* note 42, at 632-33.

[83] Interstate Commerce Commission, ANNUAL REPORT (1913). The rules, revised and upheld by the Supreme Court in 1936, AT&T v. United States, 299 U.S. 232 (1936), remain in effect today. *See* 47 U.S.C. § 220(a) (1970).

Awareness of this regulatory deficiency was first reflected on Capitol Hill in 1929, when legislation was introduced to consolidate federal authority over communications in one agency. The proposed legislation distributed communications jurisdiction among the ICC, which had telephone and telegraph authority, the Federal Radio Commission, which had control over the newer technology of broadcasting,[85] and the Postmaster General, who had long-standing authority over telegraph operations.[86] Hearings were held in the Senate to investigate the relocation of these split jurisdictions under one authority.[87] However, no final action was taken on the bill.

During the first year of the Roosevelt administration, the idea of a unified communications agency was rejuvenated in studies of national communications policy by both the adminstration[88] and Congress.[89] In February 1934, President Roosevelt proposed the creation of a Federal Communications Commission in which the existing authority of the Federal Radio Commission, the ICC and the Postmaster General would be consolidated.[90] This recommendation was echoed by the conclusions of the massive congressional study of the communications industry headed by Dr. William Splawn.[91] The day after Roosevelt's message, legislation designed to achieve the goal of consolidation was introduced,[92] and the drafting of what became the Communications Act of 1934 began.

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[84] Note, *supra* note 42, at 633.

[85] Authority over radio had originally been vested in the Department of Commerce in 1912, and was later relocated under the Federal Radio Commission, created by the Radio Act of 1927, Pub. L. No. 632, ch. 169, 44 Stat. 1162 (repealed 1934).

[86] *See, e.g.*, Act of July 24, 1866, ch. 230, 14 Stat. 221 (fostering construction of telegraph lines by providing rights-of-way over public lands).

[87] *Hearings on S. 6 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 1st Sess. (1929) (Couzens bill).

[88] Interdepartmental Committee, 73d Cong., 2d Sess., Study of Communications, (Roper Report) (Sen. Comm. Print 1934).

[89] Preliminary Report on Communications Companies (Splawn Report), H.R. Rep. No. 1273, 73d Cong., 2d Sess. (1934).

[90] The text of President Roosevelt's message to Congress read in part:

> I have long felt that for the sake of clarity and effectiveness the relationship of the Federal Government to certain services known as "utilities" should be divided into three fields: Transportation, power, and communications . . . .
>
> In the field of communications . . . there is today no single Government agency charged with broad authority . . . .
>
> I recommend that Congress create a new agency to be known as the "Federal Communications Commission", such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission . . . .

Message to Congress, Feb. 26, 1934, *reprinted in* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 1-2 (1934).

[91] Splawn Report, *supra* note 89, at xxix.

[92] S. 2910, H.R. 8301, 73d Cong., 2d Sess. (both introduced Feb. 27, 1934).

As was the case with many of the early initiatives of the first Roosevelt administration, the legislative process was swift. Senate hearings were underway within three weeks,[93] the House hearing began a month later.[94] Both reports were out by June 1[95] and debate was completed by the next day; the work of the conference committee was then done and approved in a week.[96] The whole process took just over 100 days. The speed with which the bill was enacted has given some commentators alarm;[97] for a measure that was to have such a fundamental impact on an industry as the Communications Act has had, more deliberation would seem to have been appropriate.[98] Moreover, the debate on the Act centered on broadcasting and almost neglected wire carriers altogether. Nevertheless, the period from February 27 to June 9, 1934 represents the first and the last time that Congress as a body has turned its attention to the full range of issues associated with the regulation of the telecommunications industry.[99] It is, therefore, the sole source of the law and policy which must govern federal administrative regulation[100] of telecommunications. Whatever statutory restraints exist on FCC policy-making, especially on its policies regarding competition in the modern compunications markets, are to be found within the text of the Act and the legislative record that accompanied its passage.

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[93] *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. (1934).

[94] *Hearings on H.R. 8301*.

[95] S. Rep. No. 781, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[96] H.R. Rep. No. 1918, 73d Cong., 2d Sess. (1934) (Conference Report), *reprinted in* 78 Cong. Rec. 10969 (1934).

[97]
> The Dill bill [the original version of the Communications Act] was debated only briefly in the Senate, the entire debate taking place on May 15, 1934 . . . . The bill was then passed without a roll call.
>
> In the House, the debate was even briefer, being limited to only two hours on June 2, 1934. The shortness of the debate in both houses is striking, bearing in mind the importance of the bill, which worked a complete transformation of the regulation of communications.

IV B. Schwartz, *supra* note 12, at 2375-76 (1973). The committee reports were nine and eleven pages, respectively, most of which were given over to a simple recounting of the bill's provisions. The debates were not only short, but highly partisan, with Republican allegations that the Roosevelt administration—already making political use of radio through the fireside chats—would use the FCC for partisan ends. *See* 78 Cong. Rec. 10317 (1934) (remarks of Rep. Fish). Almost no debate took place on the common carrier provisions of the new law.

[98] It would be useful, however, to compare the extent of congressional consideration given the Communications Act with comparable early New Deal legislation such as the National Industrial Recovery Act of 1933, the Securities Act of 1933, the Securities Exchange Act of 1934 and others. It may be that Congress gave no less attention to rewriting the communications law than to other major federal regulatory statutes.

Note also that the short attention given to the Communications Act may be due to some degree to a contemplation that more legislation on the subject would be enacted as a result of the studies commissioned by the Act. See the discussion of section 215 at text accompanying notes 204-10 *infra*. The studies produced no major revisions or expansions of the Act.

[99] That this was the first full consideration is evident from the cursory or partial attention given telecommunications in the Mann-Elkins, Esch-Cummins, and Willis-Graham Acts. That this was the last full consideration is indicated by the fact that no major revisions of the Communications Act have been accomplished since 1934. The principal amendments to the wire communications authority of the act have been the addition of section 222, permitting the Western Union-Postal Telegraph merger, see note 63 *supra*, and the requirement that carriers obtain a certificate of convenience and necessity for abandonment of facilities as well as

2. *The Telecommunications Provisions of the Act.* The Act itself drew heavily on its predecessors, reflecting its origins in the amalgamation of the separate existing federal authorities over portions of the communications markets. Title II of the Act incorporated the provisions of the Interstate Commerce Act that had governed telephone and telegraph since 1910. Title III adopted the substance of the Radio Act of 1927 governing broadcasting. Titles IV-VI set forth general administrative procedures used in much of the federal regulation in operation at the time. Only Title I, which announced the creation of the FCC and stated broadly the purposes of the Act, was more the product of the Communications Act's drafters than of the statutes which previously governed communications regulation.

While it is true that the wire communications provisions of Title II were carried over, basically intact, from the Interstate Commerce Act, some new powers over common carriers were granted to the FCC that had not been available to the ICC in regulating telecommunications. Section 201(a) empowered the FCC to require carriers to interconnect with other carriers and to establish through-routes.[101] Section 201(b) resolved ambiguities over whether ICC jurisdiction had extended beyond regulation of rates and charges; the statute granted the FCC clear authority to review not only carriers' charges, but also their "practices, classifications, and regulations," to determine whether they were just and reasonable.[102] Section 203

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expansion, Pub. L. No. 4, ch. 10, § 2, 57 Stat. 11 (1943) (amending 47 U.S.C. § 214(a)). Other amendments have been of a specialized or housekeeping sort, or concerned with specialized areas of carriage by satellite. *See* Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419 (codified at 47 U.S.C. §§ 701-744 (1970)) (illustrating the way modern communications technologies raise problems which are reflected in the Title II common carrier scheme).

Congress may be in the process of undertaking a complete review of telecommunications regulation in considering the Consumer Communications Reform Act and legislative countermeasures. See note 10 *supra*.

[100] It is worth remembering, of course, that telecommunications is also subject to federal regulation under the antitrust laws. *See* AT&T v. United States, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977).

[101] 47 U.S.C. § 201(a) (1970). This was adapted from section 1(4) of the Interstate Commerce Act, which had applied only to transportation carriers. *See Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, supra* note 93, at 200. AT&T had been under a nonstatutory duty to interconnect other carriers in most circumstances as a result of the Kingsbury Commitment. See text accompanying notes 59-60 *supra*.

[102] 47 U.S.C. § 201(b) (1970). This was adapted from section 1(6) of the Interstate Commerce Act, which gave the ICC authority over practices, classifications and regulation of transportation carriers only.

made filing of rate schedules with the FCC mandatory for communications carriers, a duty which had not been imposed under the Interstate Commerce Act.[103] Section 204 empowered the FCC to make use of these filings to investigate proposed changes in rates not only after a user presented a complaint but "upon its own initiative without complaint," and to suspend the proposed rate schedule pending the investigation.[104] Section 211 gave the FCC authority to require the submission of contracts made by any carrier. Section 214 made it a condition for the expansion or construction of new interstate telecommunications lines that the carrier obtain a certificate of public convenience and necessity from the Commission.[105] And section 218 instructed the FCC to keep abreast of technological developments in telecommunications "to the end that the benefits of new inventions and developments may be made available to the people of the United States."[106] The sum effect of these new provisions was to afford the newly-established federal agency regulating communications carriers the same repertoire of tools and powers used by the ICC in regulating transportation carriers.

In at least one respect, however, the Communications Act went well beyond its precursor amendments to the Interstate Commerce Act. Title I enunciated an overarching goal to which the Title II powers, together with the Title III authority over broadcasting, were to be directed:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges, for the purpose of national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . . .[107]

This statement of purpose was not derived from, or even foreshadowed by, the 1910, 1920 or 1921 communications amendments to the Commerce Act or the overall railroad regulation scheme to which the amendments were appended. It is original to the Communications Act. As such it may play an important role in determining the intent of the seventy-third Congress with respect to national telecommunications policy; the established carriers have made recourse to it as a building block in the argument that FCC discretion to permit telecommunications competition is circumscribed by congressional endorsement of a monopolistic market structure.[108] This novel view of the Act is explored in Part IV below. But for the most part, this statement of purposes has been ignored by courts and regulators who, in the process of discerning statutory policy toward telecommunications competition, have read the Act to grant the FCC an almost plenary authority over the structure of American telecommuncations.[109] It is this more orthodox view of Communications Act policy which will be examined in Part III.

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[103] 47 U.S.C. § 203 (1970). *Compare* section 6 of the Interstate Commerce Act (filing required for transportation carriers only).

[104] 47 U.S.C. § 204 (1970). This reflected powers the ICC had over railroads through section 15(7) of the Interstate Commerce Act. See text accompanying note 79 *supra*.

[105] 47 U.S.C. § 214 (1970). This was based on sections 1(18)-(22) of the Interstate Commerce Act, requiring such certificates for expansion of rail carrier lines.

[106] 47 U.S.C. § 218 (1970). No such duty had been imposed on the ICC during its tenure over telephone and telegraph.

[107] Communications Act of 1934, § 1, 47 U.S.C. § 151 (1970). See text accompanying notes 164-203 *infra*.

III. THE ORTHODOX VIEW: CREATION OF A NEW REGULATOR

From the record, it is quite clear that one purpose of the seventy-third Congress in passing the Communications Act of 1934 was to centralize authority over telecommunications in one federal regulatory body. The ICC's regulation of telephone and telegraph had resulted in essentially no regulation at all, while the burgeoning radio industry had been subject first to the jurisdiction of the Secretary of Commerce, then of the Radio Commission. By 1934, an awareness was surfacing that the separate technologies of telephone, telegraph, and radio played complementary roles in the larger network of what had come to be called the "communications industry." Along with that awareness grew the idea that a unified, coordinated system of regulation for communications was needed. President Roosevelt's message to Congress accompanying the administration proposal for the Communications Act stressed the need for a "single Government agency charged with broad authority."[110] The point was repeated by almost every witness at the hearings on the Act and in both committee reports. That the establishment of this "single agency" was foremost in the minds of the Communications Act's authors and proponents is abundantly clear.

The difficult question is whether Congress intended to accomplish anything beyond centralization in passing the Communications Act. Was the entire purpose of the Act to relocate the disparate authorities of the ICC, the Radio Commission and the Postmaster General in a single body, yet not alter the law which that body was to apply and the policy by which it was to be guided? Or did the Act work not only a restructuring of the regulatory process for telecommunications and other communications areas but also a new or expanded law and policy relating to telecommunications technologies?

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[108] See text accompanying notes 149-250 *infra*.

[109] See text accompanying notes 110-148 *infra*.

[110] Message to Congress, *supra* note 90, at 1.

A. *The Legislative History.*

There is strong support in the legislative history for the view that the Act's objectives were limited. In the first place, the two studies which led to the drafting of the Communications Act recommended only restructuring of the regulatory jurisdictions. The Roper Report,[111] the Roosevelt administration's first report on communications problems, suggested only a centralization of authority. The President's message to Congress proposing the Communications Act followed this view by emphasizing the organizational problems of communications regulation and urging only the "transferring [of] the present authority" without altering it.[112] The Splawn Report on communications holding companies prepared for the Commerce Committees—the report that provided the factual basis on which the seventy-third Congress acted—proposed a bill which

> would accomplish three purposes: (a) A codification of existing Federal legislation regulating communications; (b) a transfer of jurisdictions from several departments, boards, and commissions to a new communications commission; and (c) a postponement for future action after further study and observation of some of the more difficult and controversial subjects.[113]

In neither report was change in the substance of regulation thought necessary.

Both congressional committees reporting the Communications Act indicated the same view. The House Commerce Committee explained that

> it is the primary purpose of this bill [the Communications Act] to create such a commission [with comprehensive jurisdiction] armed with adequate statutory authority to regulate all forms of communication . . . . The bill is largely based upon existing legislation and except for the change of administrative authority does not very greatly change or add to existing law . . . .[114]

Committee Chairman (and later Speaker of the House) Rayburn told his colleagues during the debate that "the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective."[115] The Committee emphasized that the "minor amendments" to which Chairman Rayburn referred, meaning the addition of the several regulatory powers which had been unavailable to the ICC under the Mann-Elkins and Esch-Cummins Acts,[116] were not intended to signal any new direction in communications policy. Rather, the amendments were designed to provide the FCC with statutory powers comparable to those customarily employed in transportation regulation. As the committee report explained:

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[111] THE ROPER REPORT, *supra* note 88.

[112] Message to Congress, *supra* note 90, at 2.

[113] SPLAWN REPORT, *supra* note 89, at xxix.

[114] H.R. REP. NO. 1850, 73d Cong., 2d Sess. 3 (1934).

[115] 78 CONG. REC. 10313 (1934) (remarks of Rep. Rayburn). *See id.* 10315 (colloquy between Reps. Rayburn and Snell):

Mr. Snell: No change in the present law?
Mr. Rayburn: We transfer the jurisdiction to the new commission, and the only amendment as to the telegraph and telephone companies is to make effective their transfer.

> [T]he [Commerce] act never has been perfected to encompass adequate regulation of communications, but has really been an adaptation of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the terms of the act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of court and commission interpretation of that act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers.[117]

According to the committee, the Title II communications common carrier provisions "[f]or the most part . . . [follow] provisions of the Interstate Commerce Act now applicable to communications or [adapt] some provisions of that act now applicable only to transportation."[118] Thus, the House expressed a firm intent to maintain the continuity of the fundamental substantive law of communications regulation, embryonic as the substantive law may have been. The House also described the expanded authority under Title II as an attempt to make the existing regulatory scheme effective under the new regulators by correcting omissions and oversights resulting from the hasty and incomplete consideration given the 1910 and 1920 legislation.

The Senate Commerce Committee's conception of the bill paralleled that of the House. Noting that much of the language of the legislation was copied verbatim from the Commerce Act, the Committee explained that where the provisions varied from the text of the Commerce Act it was "for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."[119] Title II, in the Senate Committee's view, "follow[ed] provisions of the Interstate Commerce Act now applicable to communications or adapt[ed] some provisions of that act now applicable only to transportation."[120] On the Senate floor, Chairman Dill called attention to the fact that nearly three-quarters of the bill "comprise[d] a rewriting of existing radio law and its amendments and of the Interstate Commerce Act and its amendments," while the remainder provided "for certain additional powers which the committee thought were necessary for the newly created commission to have for effective regulation."[121] As the committee report made clear, these new powers were not thought to express any new policy other than that regulation of communications and telecommunications[122] was to become more effective than had been the case to date.[123]

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[116] See text accompanying notes 101-06 *supra*.

[117] H.R. REP. No. 1850, *supra* note 114, at 4.

[118] *Id.* 5.

[119] S. REP. No. 781, *supra* note 95, at 2.

[120] *Id.* 3.

The view that Congress intended no major substantive change in the law governing telecommunications is reinforced by the actions Congress did take in 1934 regarding possible changes in the federal policy toward the communications industry. As noted earlier, President Roosevelt in his message proposing the Communications Act requested only a reorganization of regulatory jurisdictions. Rather than ask for reorientation of communications policy, Roosevelt suggested that the new FCC be given "full power to investigate and study the business of existing [communications] companies and make recommendations to the Congress for additional legislation."[124] The Splawn report had urged the same course.[125] Congress followed these suggestions by requiring the new FCC to "consider needed additional legislation" in critical problem areas; the House Committee stated that existing law was not greatly changed by the new act and that the "most controversial questions [were] held in abeyance for a report by the new commission recommending legislation for their solution."[126] This postponement, embodied in section 215 of the Act,[127] explicitly shifted primary responsibility for a large part of the development of federal common carrier telecommunications policy to the new agency. Henceforth it was to be the FCC's task, not Congress', to take the first step in suggesting changes in the law governing telecommunications. Ultimate authority, of course, was to remain with the legislators; the Commission was to study and then suggest new legislation on which Congress would have to act before federal policy and law could take new shape. With respect to the meaning of the Communications Act itself, the very fact that Congress delegated to the FCC the task of formulating new legislation dealing with telecommunications supports the conclusion that Congress intended to do no more than streamline the regulatory system as inherited from Mann-Elkins and Esch-Cummins. New law and new policy were left for a later date.[128]

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[121] 78 CONG. REC. 8822 (1934) (remarks of Sen. Dill); *cf. id.* 4139 (remarks of Senator Dill on introducing S. 3285) ("The purpose of the proposed legislation is to make effective the power now written into the Interstate Commerce Act to control the telephone and telegraph business in this country").

[122] It was noted that regulation of telecommunications had been "practically nil." S. REP. NO. 781, *supra* note 95, at 2.

[123] When the conference report returned to the House and Senate there was little discussion. Representative Mayes, one of the House conferees, emphasized the continuity of the substantive communications law, remarking that the bill "left existing law intact but established a new communications commission." 78 CONG. REC. 10990 (1934). Some members objected to the speed with which the bill was moved through Congress, concluding that no time had been provided for mature reflection on it. *See id.* 10988, 10989 (remarks of Reps. Bland and Lehlbach).

[124] Message to Congress, *supra* note 90, at 2.

[125] *See* SPLAWN REPORT, *supra* note 89 ("postponement for future action after further study and observation of some of the more difficult and controversial subjects").

[126] H.R. REP. NO. 1850, *supra* note 95, at 3.

[127] 47 U.S.C. § 215 (1970). Congress directed the FCC to investigate and submit legislation if necessary on intercompany transactions and relationships between holding companies and operating subsidiaries, on the provision of telegraph service by telephone companies and vice-versa, and on exclusive contracts prohibiting patrons of a carrier from doing business with other carriers. *See* 78 CONG. REC. 10314 (1934) (Rep. Rayburn's explanation of section 215). On Bell's brief venture into the telegraph business through its purchase of the Teletype Corporation, see Trebing, *Common Carrier Regulation: The Silent Crisis*, 34 LAW & CONTEMP. PROB. 299, 306 (1969).

B. *The Policy of the Act.*

In light of Congress' apparent intention that the Communications Act alter only the form of regulation in force in 1934, and thus that it carry forward intact the regulatory policy established by its predecessor statutes, it becomes particularly important to determine as best possible the content of the substantive law of the Mann-Elkins, Esch-Cummins, and Willis-Graham Acts as well as the Communications Act itself. However, as Paul Berman has written, "examination of the legislative history of telephone and telegraph regulation yields no clearer indication of just [what] . . . was in the mind of Congress."[129] Yet while it is impossible to measure with any certainty the cumulative effect on this area of the attention that Congress briefly turned toward the communications industry in 1910, 1920, 1921 and 1934, it is possible to suggest some of the dimensions of the telecommunications policy on monopoly and competition which are embedded within the statute.

Some evidence of the roots of Communications Act policy is visible in the congressional consideration of the Act itself. There is no doubt, for example, that the legislators in 1934 recognized as they had in 1921[130] the existence of AT&T's telephone monopoly.[131] But, again as in 1921, at no point during the congressional debates or in the brief committee reports was the scope of that monopoly discussed. None of the legislators responsible for the Communications Act so much as indicated a view on whether "monopoly" in this instance encompassed only the operation of basic trunk and switching centers in local, geographically compact areas or extended to all methods of voice communication by wire; nor did they indicate whether "monopoly" included manufacture and sale as well as maintenance of the equipment through which that communication was accomplished.

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[128] The contemporary commentary on the Communications Act also reinforces this conclusion. One observer complained that

> it appears on analysis that the administration has no program or policy at all, except to consolidate communications control, and that it has not and apparently will not come to grips with the really vital questions which must all be solved before the country has a sound communications policy.

Webster, *Notes on the Policy of the Administration with Reference to the Control of Communications*, 5 AIR LAW REV. 107, 107-08 (1934). *See also* Note, *The Communications Act of 1934*, 5 AIR LAW REV. 299 (1934).

[129] Berman, *Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission*, 27 FED. COM. B.J. 161, 215 (1974) (examining whether so-called packet communications fit the Communications Act definition of "common carrier" and "wire carrier").

[130] See text accompanying notes 67-68 *supra*.

[131] *See* S. REP. No. 781, *supra* note 95, at 2 ("this vast monopoly which so immediately

Of course the standard response to this observation is that Congress was not more articulate because in 1934 the meaning of "the telephone monopoly" was generally known. Since no one needed an explanation, no explanation was given. To an extent, this response is accurate; there was apparently a consensus about certain aspects of "the telephone monopoly."[132] But there was also clear disagreement about how far the scope of the monopoly should be permitted to reach, and about how great a role competition should play. The hearings on the Communications Act aptly illustrate this disagreement. At one extreme, David Sarnoff, influential through his control of the National Broadcasting Company radio network at the time, advocated the complete abandonment of competition in communications.[133] AT&T emphasized the widespread acknowledgment by state regulators "that the telephone is a monopoly and competition against the public interest."[134] On the other hand, the independent telephone companies vigorously denied that all forms of competition in telecommunications were wasteful.[135] In fact, they insisted that telephone service improved only under the mutual prodding of competitors. Since it would be safe to say that both AT&T and the independents had some influence in Congress at the time,[136] it cannot be assumed that either pole of the debate evidenced by the hearings represented the dominant view of the period. To the contrary, it should be clear that the bromidic assertion that "telephone is a monopoly" meant different things to different interests; the national policy concerning monopoly and competition in the telecommunications industry was not intuitively known by all.

Neither was it clear, for that matter, what kinds of "competition" were

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serves the needs of the people in their daily and social life must be effectively regulated"); 78 CONG. REC. 10315 (1934) (remarks of Rep. Rayburn).

[132] See text accompanying notes 69-72 *supra* & note 137 *infra*.

[133] Address by David Sarnoff, *printed at* 78 CONG. REC. 5209 (1934).

[134] *Hearings on H.R. 8301* at 200 (testimony of W. Gifford on behalf of AT&T).

[135] "To these people [who advocated the Bell argument for monopoly] the wastes of competition seem as obvious as the flatness of the earth. You need only to look at it to see that it is flat." *Id.* 267 (testimony of D. Friday on behalf of the independent telephone companies).

[136] There were over 6000 independents serving 14,000 communities at the time of the passage of the Act. *Id.* 200 (testimony of W. Gifford). It may be inferred from these statistics that the independents' voice was not ignored in Congress.

envisioned. The independents' witnesses emphasized the benefits of two competitive practices: the yardstick for measuring the comparative performances provided by the limited competition between adjacent but not overlapping local service monopolies which were not engaged in direct competition for revenues, and the technological innovations that resulted from competitive manufacture and procurement. But other potential sources of telephone competition were not mentioned during the congressional consideration of the Act.

Although the historical evidence indicates no general contemporary "sense" of a telecommunications market structure envisioned by the Communications Act, there was one area where a broad contemporary agreement favoring monopoly did exist during the period in which the Act was passed. It was conceded that routine local telephone service—the routing and switching of calls within a geographic area—required a monopoly. Even the independents, who had local basic-service monopolies of their own, found competition in this area indefensible.[137] This was little more than a continuation of the basic concern that had first surfaced in the Willis-Graham Act. It remained the only limit on telecommunications market structure with firm support in the enacting record, as it had been in 1921.[138]

With the exception of this support for a local service monopoly, it can be argued convincingly that in the formulation of telecommunications regulation between 1910 and 1934 Congress failed to agree on any substantive policy. This lack of agreement does not imply, however, that from 1910 to 1934 there was no telecommunications policy at all. Although Congress did not endorse any particular structure for the telecommunications market beyond the local geographic monopoly, it did make clear that the nature of the market structure was to be left to public, not private, decisionmaking. Although procedural rather than substantive in emphasis, this clarification was no less a policy than a flat promonopoly or procompetition policy would have been. The unifying theme throughout the congressional considerations of telephone and telegraph policy from Mann-Elkins to the Communications Act is that the allocation of authority over the interstate telecommunications market should reside finally in a public regulatory body. The Communications Act was adopted largely in response to the failure of the Mann-Elkins, Esch-Cummins and Willis-Graham Acts to realize this goal.

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[137] "One kind of competition was, indeed, eliminated [in the period prior to 1934]. The experience of previous years had shown that two telephone systems in the same community are neither economical nor convenient." *Id.* 269 (statement of D. Friday, on behalf of the independent telephone companies); *cf. Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, *supra* note 93, at 100 (testimony of W. Gifford on behalf of AT&T) ("They [telephone companies] are a monopoly in the particular place they are in").

[138] See text accompanying notes 69-72 *supra*.

The ICC's inability or unwillingness to carry out its responsibilities in this area resulted in the creation of a public decisionmaker with clear and unified authority over communications.[139] Moreover, in overseeing the telecommunications market structure, the new regulator was to have teeth, as indicated by the grant of expanded regulatory tools in the Communications Act.[140] The new regulator was to operate under the broadest charter imaginable—a standard of public interest, convenience and necessity. Its power apparently was as extensive as that of the federal government under the commerce clause of the Constitution.[141] It was to view the market open-endedly, with an eye out to new developments.[142] And above all, it was to ensure that telecommunications "be effectively regulated."[143] Whatever that mandate implied for the structure of the market, the determination was to rest with the Commission and not with the private players.

The adoption in 1934 of this essentially procedural policy is not startling. As has frequently been said, the legislators did not anticipate the development of sophisticated microwave or data processing technologies or of specialized communications needs that would require a multiplicity of services and equipment. But as the debate[144] and the Act itself[145] indicate, Congress was aware that the communications market was in a process of evolution. Although there is little doubt that, given the historical period in which Congress acted, the creative force behind this evolution was to come from private actors, the task of directing that evolution was made a public one.[146] It was the establishment of a regulatory process capable of this task of public regulation to which the Communications Act and its predecessors were addressed.[147] The result of this policy was to commit the structure of the telecommunications market to political interaction before the Commission, subject to rather cursory substantive judicial review; the distribution of opportunities during the evolution of telecommunications was left to a political resolution without significant legislative limits on the outcome.[148]

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[139] See text accompanying notes 82-84 *supra*.

[140] See text accompanying notes 101-06 *supra*.

[141] See text accompanying notes 54-56 *supra*.

[142] Communications Act of 1934 § 218, 47 U.S.C. § 218 (1970), discussed in text accompanying note 106 *supra*.

[143] S. REP. NO. 781, *supra* note 95, at 2. *See also* 78 CONG. REC. 10313-15 (1934) (remarks of Rep. Rayburn).

[144] *See* remarks of Rep. Merritt, quoted at note 6 *supra*. See text accompanying notes 54-56 *supra*, discussing *Pensacola Telephone* and the Esch-Cummins Act.

[145] See text accompanying note 106 *supra*.

[146] The contemporary commentary—what little of it there was—recognized this as a central outcome of the Communications Act. *See* Note, *The Communications Act of 1934*, 21 VA. L. REV. 318, 324-25 (1934):

> The added powers vested in the Commission should prove of benefit to the public in possible rate reductions and closer regulation of the carrier's activities for the public good. The Act, however, should be equally helpful to the carriers. Though at present there seems little chance of any true competition in the field, the same was thought true in the field of transportation thirty years ago. With unified control, the interests of the carriers may be better preserved should such competition arise in the future.

[147] What Justice Holmes said of the Constitution can also be said of the Communications Act: "[W]e must realize that they have called into a life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope they had created an organism." Missouri v. Holland, 252 U.S. 416, 433 (1920).

IV. "TRUE FAITH" AND THE 1934 MILIEU

A. *The New Model*.

Like most reformations, the FCC's procompetition policy has produced a counterreformation[149] led by those whose positions have been most jeopardized by the new policy—the established carriers, whose revenues are at stake, and the state regulatory agencies whose traditional jurisdiction has been partially usurped by federal authorization of competitive entry and interconnection. And as might be expected of a counterreformation, a sizeable part of the assault on the FCC competition decisions has been devoted to the articulation of a new model of the policy and theory underlying the chief document in question—in this case the telecommunications provisions of the Communications Act.[150]

At the core of this new model is a vision its advocates describe as the "true faith"[151] of the Act. The vision is a complex one, but its essential features may be briefly summarized. In its most elementary form, the new model suggests that the Communications Act provided not only for centralization of ***regulation***, as the orthodox interpretation would have it, but for the centralization of ***provision*** of telecommunications services and facilities as well. The Act, it is claimed, recognizes a "national public utility franchise . . . managed as a unified system by AT&T and its affiliates in partnership with some 1600 Independent Telephone Companies" for the purpose of "assur[ing] the maintenance and development of the telephone network."[152] The telecommunications industry under this new model would be structured as an expansive, integrated monopoly network under a single management pervasively regulated by the FCC, and free of deleterious competition. It would become the business of the FCC in this scheme to do more than simply regulate efficiently; the Commissioners would be charged with the affirmative duty to shape regulation toward an ultimate goal of ensuring that the monopoly network not be jeopardized by potential telecommunications competitors.[153]

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[148] *See* K. BORCHARDT, STRUCTURE AND PERFORMANCE OF THE U.S. COMMUNICATIONS INDUSTRY 125-26 (1970):

> The distribution of opportunities deals with the question "who gets what and how . . . ." [C]onflicts over opportunity distributions remain essentially political conflicts even though resolutions of such conflicts are delegated to executive departments or independent regulatory commissions to be decided in accordance with such general standards as "the public interest."

See also Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 219 (1969).

[149] *See* Comment, *supra* note 3.

[150] The assault has a second major front as well: the attempt to secure the replacement or revision by Congress of the Act itself, rather than mere reinterpretation of it in the courts. See note 10 *supra*. This study is primarily concerned with the effort via litigation to invest the 1934 Act with a new, more monopoly-oriented character, not with legislative reforms. However, the outcome of the effort to interpret the existing statute has significant ramifications for the current legislative debate. See text accompanying notes 251-52 *infra*.

[151] *The Great Telephone Debate* 64-65.

[152] *See The Great Telephone Debate* 64. This article represents one of the most comprehensive statements of the new model.

According to its proponents, the consequence of this new model of the law of telecommunications regulation is the emergence of four sub-principles designed to implement the overarching goal of protecting the franchised monopoly network. First, the FCC may not permit the entry into the industry of telecommunications services or facilities that operate outside the network itself and that duplicate existing services without providing users more than what is available from the unified, franchised network—the "no duplicative competition" principle.[154] Second, the FCC may not permit the offering of communications services or facilities from outside the network which carry a risk of being technologically incompatible with the network offerings— the "technical harm" principle.[155] Third, the FCC may not

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[153] *See The Great Telephone Debate* 65: "[T]he basic contention . . . [is] that the 1934 Act, and common sense in any event, require the FCC to preserve, maintain, and use the resources of the integrated telephone network where it is economic to do so, as an immensely valuable national asset and the heart of our communications system." See notes 40 *supra* & 179 *infra*.

[154] This focus on duplication of services is evident in AT&T's criticism of the *Specialized Common Carrier* decisions, Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C.2d 870, *aff'd sub nom.* Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976); Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). AT&T considers the services provided by the specialized common carriers to be duplicative of basic long-distance service and insists specialized common carriers are no more than "other" common carriers which have no place in the scheme established by the Communications Act. *See* AT&T v. FCC, 539 F.2d 767 (D.C. Cir. 1976); *Domestic Common Carrier Regulation: Hearings on H.R. 7047 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, *supra* note 10 (statement of Eugene V. Rostow on behalf of AT&T).

[155] The "technical harm" threat has been advanced primarily by AT&T in challenging the interconnnection decisions following *Carterfone*. Problems of technical interface and design may expose the network to deterioration and increased maintenance costs. *See Domestic Common Carrier Regulation: Hearings on H.R. 7047 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, *supra* note 10 (statement of Eugene V. Rostow on behalf of AT&T). The arguments regarding technical harm to network integrity are ably discussed in Report on the Panel on Common Carrier/User Interconnections, Computer Science and Engineering Board, National Academy of Sciences, *A Technical Analysis of the Common Carrier/User Interconnections Area* (report to Common Carrier Bureau, FCC, June, 1970). *See also* Note, *Competition in the Telephone Equipment Industry: Beyond* Telerent, 86 YALE L.J. 538, 546 & n.33 (1977) (concluding that AT&T's argument is "overstated"). *Cf.* Baker, *Competition and Regulation:* Charles River Bridge *Recrossed*, 60 CORNELL L. REV. 159 (1975).

The specter of technical harm is also potentially relevant to specialized common carrier competition, although less forcefully than to terminal equipment interconnection competition, permit providers from outside the network to offer alternative communications services or facilities which, because they may be used interchangeably with network-originated offerings, threaten the revenues and thus the economic health and stability of the network providers—the "economic harm" or "cream-skimming" principle.[156] Finally, the FCC may not prohibit the network from providing any new telecommunications-related service or facility, whether within or beyond the scope of conventional network offerings, particularly where providers outside the network have begun or are planning to make that service or facility available— the "unrestricted entry" principle.[157]

These four principles constitute the operative rules of the new model of the Communications Act. In combination, they suggest that the fundamental purpose of regulation of telecommunications under the Communications Act is to ensure the presence of a single, expansive, unified communications network which operates as a monopoly and is protected from competition which either duplicates existing network services or threatens to do technical

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since AT&T is required to interconnect the services provided by specialized common carriers. *See* 47 U.S.C. § 201(a) (1970).

[156] The "economic harm" principle has been invoked in both interconnection and specialized common carrier challenges. With regard to interconnection, competitive manufacture and installation of terminal equipment may reduce AT&T revenues and thereby result in increased prices for basic residential and business service. The claim regarding specialized common carriers is that, whether they are truly specialized or merely duplicative, their operations threaten to "skim the cream" off AT&T long-distance revenues, which AT&T claims subsidize local service, again meaning increased basic telephone rates. *See Domestic Common Carrier Regulation: Hearings on H.R. 7047 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, *supra* note 10 (statement of Eugene V. Rostow on behalf of AT&T). *Cf.* Baker, *supra* note 155.

The fact that AT&T has relied on both the "technical harm" and "economic harm" prongs of the protected monopoly argument in attacking the interconnection and terminal equipment decisions, while resting more heavily on the "duplicative competition" prong in attacking the specialized common carrier cases, may be a semi-conscious reflection of the difference between the "core" of the system and its peripheral elements. Although the independent production of terminal equipment is strongly duplicative of the functions performed in the Bell system by Western Electric, Western Electric may not be close enough to the system core to be protected by a prohibition on duplication. On the other hand, long-distance communications facilitated by the specialized carriers closely resemble those carried out by AT&T's long lines, which must be at the core of any statutorily franchised monopoly. For core services, the "duplication" attack is strong, and resort to the technological and economic claims used to defend peripheral services—claims which, although arguable on social and economic grounds, are difficult to find in the law itself—is not required.

[157] *See, e.g.*, *The Great Telephone Debate* 65, 68. AT&T has been especially bitter about what it calls the "protective umbrella" given the specialized common carriers by restrictions on AT&T participation in new forms of private line and data processing services. *See, e.g.*, *id.* 68.

It is not only voice communications—the traditional service provided by AT&T and the independent telephone companies—which this vision of franchised monopoly encompasses. Record communications may be included as well. *See id.* ("[A]s technology abolished the older distinctions between voice and record services, . . . the scope of the network should be adjusted accordingly").

or economic harm to the network. In operation, these principles would constrict the range of policy choices open to the FCC and would compel the conclusion that FCC procompetition rules contravene the basic tenets of the federal regulatory scheme and should thus be retracted.

Whether these principles are the most logical deductions from the vision of a "natural public utility franchise," and whether their implications for recent FCC policies are as their proponents contend, remain open to debate. As a preliminary matter, however, it must first be determined whether or not these principles, and the vision they embody, possess cognizable legal roots in the 1934 Act. It is this threshold inquiry to which attention must initially be turned.

B. *The Legal Basis for the New Model.*

Until recently, the legal foundation supporting the franchised monopoly model has been plagued by an all but impenetrable ambiguity. From its earliest formulations, the legal assault on the *Carterfone* and *Specialized Common Carrier* decisions and their progeny has consisted of an amorphous combination of the legislative history of the Act, interpretation of its specific provisions and its broader scheme, and extrapolations from the overall social and legislative environment in which the seventy-third Congress acted.[158] Only with the increased attention currently being given the debate over the structure of the telecommunications market—largely precipitated by suggestions in 1976 that the Communications Act be overhauled[159]—have positions on the legal front of the competition battle crystalized.

In support of the new model, the proponents of the franchised-monopoly reading of the Act have woven together four principal sources of law: the statement of purposes of federal communications regulation found in the Act;[160] the implications of specific provisions of Title II, most notably section 215;[161] references in the legislative history to the existence of monopolistic industry structure;[162] and a general sense of the milieu surrounding the passage of the Act—including the cumulative experience and practice of federal regulation from 1910 to 1934 and the universal expectations about the telecommunications business existing at that time.[163]

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[158] *See Domestic Common Carrier Regulation: Hearing on H.R. 7047 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, supra* note 10 (statement of Eugene V. Rostow on behalf of AT&T); brief for NARUC, *supra* note 10, at 30 (inquiry into FCC competition policy begins with "consideration of the social milieu which precipitated congressional action, the legislative history, the language of the Communications Act, and the scheme established by the Act").

[159] See note 10 *supra*.

[160] Communications Act of 1934 § 1, 47 U.S.C. § 151 (1970). See notes 164-203 *infra* and accompanying text.

[161] Communications Act of 1934 § 215, 47 U.S.C. § 215 (1970). See notes 205-10 *infra* and accompanying text.

[162] See notes 211-28 *infra* and accompanying text.

1. *Section 1: The Service-To-All Clause.* Perhaps the most interesting argument in favor of a statutorily franchised telecommunications monopoly invests the Act's opening statement of purposes with significant substantive content which both embraces the monopoly model and limits FCC discretion in its regulation.[164] Prior to the competition debate, section 1 lay dormant, seldom used by the courts and the Commission for more than an hortatory function.[165] As a general practice, regulatory decisions have been made and reviewed primarily with reference to the "public convenience and necessity" or "public convenience, interest, or necessity" standards of Titles II and III, respectively;[166] the specific substantive policy goals enumerated by section 1—adequate service to all at reasonable charges, national defense and safety—have at most played only secondary roles in explaining regulatory actions. More frequently, they have been ignored altogether. With the attempt to fashion limits on the discretion of the FCC to implement the public interest standards of Titles II and III, however, the language of section 1, particularly its service-to-all clause, has taken on new importance.

The service-to-all clause has not yet been explored in depth. Even those who have used it to reinforce the franchised monopoly model have merely cited section 1 to support conclusory generalizations about the policy of the Act.[167] More recently, however, proponents of the franchised monopoly model have argued that by describing certain service, safety and defense goals as the aims of all communications regulation, section 1 limits the types of industry structure the FCC can find to be within the public interest standards of Title II.[168] They claim that by announcing an overriding regulatory goal, the service-to-all clause defines the public interest standard which is to guide the Commission's decisions and subsequent judicial review.

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[163] See notes 229-50 *infra* and accompanying text.

[164] The full text of section 1, as currently enacted, reads:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as *to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges*, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 151 (1970) (emphasis added).

[165] *See, e.g.*, United States v. Southwest Cable Co., 392 U.S. 157, 167 (1968); National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943); Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142, 1157 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976).

[166] *See* 47 U.S.C. §§ 214(a), 303 (1970).

[167] See note 168 *infra*. *See* AT&T, Memorandum With Respect to Department of Justice Analysis of Legislative History as Set Forth in Letter from Assistant Attorney General Donald I. Baker to the Hon. Timothy E. Wirth (AT&T memorandum) (March 1, 1977), *reprinted in* 123 CONG. REC. E1357 (daily ed. March 9, 1977): "[The service-to-all clause], in particular, makes it plain that Congress envisioned a system optimized in accordance with modern engineering networking concepts in which each company participating in the provision of service would become an integral part of a coordinated nationwide network."

The use of a statutory statement of policy such as section 1 to modify or define the Act's standards is a legitimate method of statutory interpretation.[169] The statement's relevance in assessing the procompetitive decisions raises the difficult question of what section 1, and particularly the service-to-all clause, means. There are sizeable problems in the construction and interpretation of the clause which drastically limit its usefulness as a guide to determining the appropriate mix of monopoly and competition in the telecommunications market. It is therefore not surprising that the role of the clause in the creation of the legal model of franchised monopoly has been vague and essentially rhetorical.

(a) *The background of the service-to-all clause*. Almost all of the language of the Communications Act of 1934 was taken without substantial change from the Interstate Commerce Act, as amended by the Mann-Elkins, Esch-Cummins and Willis-Graham Acts. The committees responsible for the drafting of the Act assured their colleagues that the legislation contained little that did not appear in the transportation laws.[170] Yet, although it slipped through without comment, there was one unique addition: the far-reaching statement in section 1 that the purpose of federal communications regulation was to "make available . . . to all . . . a rapid, efficient, Nation-wide . . . communication service."[171]

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[168] *See, e.g.*, The Great Telephone Debate 64:

> While Congress gave the Commission broad discretion in interpreting the statutory standard of the public interest, there were limits . . . inherent in the policies of Section 1 of the Act which directed the FCC to encourage universal service on the cheapest and most efficient basis. The supporters of [the new model] believe that this direction requires the FCC to allow the network, as a regulated natural monopoly, to provide all the communications services within its capabilities.

[169] *See* A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 20.12, at 63-64 (4th ed., Sands ed. 1972). There is a crucial distinction between statements of policy which, like section 1, follow the enacting clause of the legislation and become part of the statute, and statutory preambles, which precede the enacting clause (usually as a litany of "whereas" clauses) and are not part of the statutory law. Policy statements, as a rule, are available to clarify ambiguous substantive provisions of the statute, but cannot be used to create ambiguities. There are, however, scattered examples of much more aggressive use of policy statements, including some by the Supreme Court. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (largely discredited case); Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456 (1924). *See also* Note, *Legal Effect of Preambles—Statutes*, 41 CORNELL L.Q. 134 (1955).

[illegible]us, in order for section 1 to be relevant under the usual rules of statutory interpretation, there must be some ambiguity in the remainder of Title I or in the provisions of Titles II and III, which section 1 may clarify. Most of the Communications Act is ambiguous enough to authorize recourse to section 1 as an interpretive aid, particularly in areas such as interconnection, specialized carriage and data transmission.

[170] See text accompanying notes 114-23 *supra*.

The Commerce Act amendments of 1910, 1920 and 1921 contained no declarations of policy; in fact, communications had been specifically excluded from the comparable statement of policy in the Esch-Cummins Act, which the 1934 Act eventually displaced.[172] Nothing in the preamble to the Radio Act swept as broadly.[173] The drafters of the Communications Act thereby put on record, for the first (and only) time, Congress' all-embracing goal with respect to communications regulations.

Surprisingly, this potentially important new provision has virtually no legislative history. The original versions of the Communications Act, which were drafted principally by the administration[174] and introduced the day after President Roosevelt's message as S. 2910 and H.R. 8301, opened with this statement of dual purpose:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, *to all* the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication *service* with adequate facilities at reasonable charges, and for the purpose of securing a *more effective execution of this policy* by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created [the FCC].[175]

A third goal, "the national defense," was added in committee.[176] The official documents of the House did not mention the existence of the purposes section except to parrot it in passing. The Senate report noted that section 1 "declares the policy of Congress, assuring an adequate communications system for this country,"[177] but said no more, and the Senate debate and the conference committee were completely silent on this provision. No indication was made at any point in the official documents or record of what the language means, how far it reaches or from where it was derived.

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[171] 47 U.S.C. § 151 (1970).

[172] See note 45 *supra* and accompanying text.

[173] The preamble to the Radio Act contained the following language:

> [T]his Act is intended to regulate all forms of interstate and foreign radio transmission and communications within the United States . . . ; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority . . . .

Radio Act of 1927, Pub. L. No. 632, ch. 169, § 1, 44 Stat. 1162 (1927) (repealed 1934). This statement of purposes was carried forward essentially unchanged as section 301 of the Communications Act.

[174] 78 CONG. REC. 8822 (1934) (remarks of Sen. Dill).

[175] S. 2910, H.R. 8301, 73d Cong., 2d Sess. (1934) (emphasis added).

[176] S. 3285, 73d Cong., 2d Sess. (1934) (committee bill). The fourth goal of the Act as it currently stands, "for the purpose of promoting safety of life and property through the use of wire and radio communication," was added by amendment in 1937. Act of May 20, 1937, Pub. L. No. 97, ch. 229, § 1, 50 Stat. 189 (1937) (codified at 47 U.S.C. § 151 (1970)).

It is still possible, of course, to speculate about likely sources of this "service-to-all" concept and language. During the debate on the last major legislative action in the telecommunications area prior to 1934, the 1921 Willis-Graham Act, Representative Graham chose an almost identical way of articulating the federal interest in telecommunications: "I think I am stating the opinion of most men who have carefully considered the matter, that it is believed to be better policy to have one telephone system in a community that *serves all the people* . . . than it is to have two competing telephone systems."[178] It might be that section 1 was designed to refer specifically to this statement, carrying the national aim of communications regulation as expressed on the floor of the House into the statutes. Or it may have been that the concept first enunciated by Theodore Vail in 1907[179] of a unified, singly-managed telephone system providing universal telephone service under government regulation, found its way into the preamble of the Act by either tacit or unconscious adoption. And again, it may simply have been that the "service-to-all" language represented a highly generalized and diffuse shared sense of the fundamental aim of communications providers and regulators without any specific content concerning how that service was to be provided. That the central goal of regulating communications was to make service available to all was something everyone could agree on in 1934 without giving up disagreements about the best way to accomplish that goal.[180] Or the "service-to-all" language may have been in reality nothing more than New Deal boilerplate, intended to provide the FCC with something that would pass for an "intelligible principle" to guide its regulation and thereby satisfy the courts' requirement that policy-making powers not be delegated by Congress without providing some standard for their use by administrative agencies.[181] The question of which, if any, of these speculative explanations is the correct one is not clearly addressed or resolved by the record.

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[177] S. Rep. No. 781, *supra* note 95, at 3.

[178] 61 Cong. Rec. 1983 (1921) (remarks of Rep. Graham) (emphasis added).

[179] AT&T Annual Report 17-18, 28 (1907); *see* Gabel, *supra* note 15, at 356. An accessible early explication of the Bell viewpoint of this era can be found in an article by Arthur Stedman Hills, a Bell lawyer, *The Telephone as a Public Utility*, 21 Case and Comment 881 (1915). This concept, which is summarized in the Bell slogan, "one system, one policy, universal service," FCC, Investigation of the Telephone Industry in the United States, H.R. Doc. No. 340, 76th Cong., 1st Sess. 145-46 (1939), was advanced by Bell officials at the hearings on the 1934 legislation. *Hearings on H.R. 8301* at 200-01 (testimony of W. Gifford on behalf of AT&T).

[180] *Compare Hearings on H.R. 8301* at 200 (testimony of W. Gifford on behalf of AT&T) (supporting the position that telephone service to all is best provided by limiting competition), *with id.* 267 (testimony of D. Friday on behalf of the independent telephone companies) (arguing that competition provides the better method for providing telephone service to the public).

(b) *Exploring the meaning of "service-to-all."* Nevertheless, it can be argued that, at some point in attempting to understand modern statutes, recourse to legislative history must yield to a close reading of the language and construction of the statute itself. As expressed by one court, "an explanatory tale should not wag a statutory dog."[182] Particularly with congressional documents as unilluminating as those regarding this issue, what the Act may be read to say on its face becomes doubly important. And a close reading of the "service-to-all" clause can unearth an alternative reading of the Act that is at odds with the more traditional view that nothing more was accomplished in 1934 than the creation of a unified regulatory mechanism for communications.

In the first place, the construction of section 1 may in some measure belie the traditional argument that more effective regulation was the Act's primary goal. As now constituted, the statement of purposes for the Act has four separate clauses: the first announcing the "service-to-all" concept, followed by the "national defense" and "safety of life and property" clauses, and finally the "more effective execution" clause.[183] Only the first and the last were part of the original drafts of the Communications Act introduced on February 27, 1934; the "national defense" clause was added after the committee hearings.[184] As originally conceived, then, the Act can be read to have had a dominant aim of achieving insofar as possible "service-to-all," and a subordinate aim of "securing a more effective execution of this policy" by centralizing and expanding on the existing federal authority over communications. As currently written, the Act adds two complementary goals to the initial dominant theme of "service-to-all" and makes all three the cumulative policy which the final "more effective execution" clause is to serve. Regardless then of what Congress said about desiring only to legislate the more effective regulation of which both

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[181] In 1934 the "intelligible principle" rule of the *Hampton* case was still the leading authority on delegation of legislative and quasi-legislative powers by Congress, and no statute had yet been struck down for unconstitutional delegation. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to lay down an "intelligible principle to which the [agency] . . . is directed to conform"). The confusion that arose in the delegation doctrine with the *Schecter* and *Panama Refining* cases striking down the National Industrial Recovery Act of 1933 was still to come. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[182] A.P. Green Export Co. v. United States, 284 F.2d 383, 386 (Ct. Cl. 1960) (Jones, J.). *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 164-75 (1975).

[183] 47 U.S.C. § 151 (1970).

[184] See text accompanying note 176 *supra*. *See* address by David Sarnoff, *supra* note 133.

Chairman Rayburn and Chairman Dill spoke during the debates,[185] the terms of section 1 place the goal of effective regulation within the larger context of the broad "service-to-all" policy and its complements.

This may be to say no more than that Congress for the first time in 1934 articulated what had in fact been the national communications policy at least since 1921 (and possibly since 1910), that at the heart of that policy had been "service-to-all," and that section 1 therefore did not change the existing law any more than did the provisions that follow it. This would accord with the general suggestion in the legislative record that no change was intended. But whether the "service-to-all" concept was something new or just a verbalization of what had been implied before, that it precedes the statement of the goal of better regulation and announces the considerations that are to inform the exercise of that regulation indicate that more than a simple restructuring and streamlining of the regulatory process was achieved by the Act. The regulatory process was given a set of substantive aims—service, safety and defense—and arguably those aims placed substantive limits on what directions the regulatory process could take. Assuming for the moment that it can be shown that economic or technical harm to the statutory network from any specific form of competition has the effect of retarding the achievement of these service, safety or defense aims, it could then be argued that the structure of section 1 precludes the FCC from permitting that competitive offering.

Furthermore, beyond the construction of section 1, the actual language of the "service-to-all" clause may serve to amplify the importance of the section in the Communications Act scheme. As the Supreme Court has noted in a classic passage on statutory interpretation, the "words by which the legislature undertook to give expression to its wishes . . . [o]ften . . . are sufficient in and of themselves to determine the purpose of the legislation."[186] Within the words of the "service-to-all" clause, it can be argued, there is an "expression of wishes" which speaks over the cacaphony of the legislative history. To reiterate, the clause states the purpose of the Act as "regulating interstate and foreign commerce on communication by wire and radio so as to *make available*, so far as possible, *to all* the people of the United States *a* rapid, efficient, Nation-wide and world-wide wire and radio *communication service* with adequate facilities at reasonable charges."[187] The important point to note about this clause is that it contemplates not "communication service" in the broad, generic sense but rather "*a* . . . communications service." It might be argued that this phrase does not include service provided by whomever has the wherewithal to enter the communications business and in whatever form the market forces may eventually dictate but, rather, means that the service is to be provided by a single, unified, national communications concern, with the strong monopolistic characteristics that the phrase implies. By contrast, the declaration of purposes for the Esch-Cummins Act—from which communications was clearly excluded[188]—calls on the executing agency only to "promote, encourage, and develop water transportation *service* and facilities,"[189] suggesting only the diffusion of maritime transportation services through a multiplicity of providers[190] rather than centralized provision through "a" service. In the communications area, on the other hand, the presence in section 1 of the "a . . . communications service" language can be taken to direct federal policy in the opposite direction, toward the maintenance of a communications monopoly. The fact that this service was to be "rapid, efficient, Nation-wide, and world-wide," all factors which frequently are invoked to defend monopoly market structures,[191] serves to reinforce the notion that the drafters intended a centralized and exclusive provision of communications capacities which were to be available to all.

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[185] See text accompanying notes 115 & 121 *supra*.

[186] United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940).

[187] Communications Act of 1934, § 1, 47 U.S.C. § 151 (1970) (emphasis added).

To make the statutory policy toward the structure of the telecommunications industry turn on the drafters' choosing to express the "service-to-all" policy in a singular rather than a plural mode, as this reading of the clause suggests, would be extreme. If the drafters deliberately intended to convey a significant shift from the policy of multiple providers implicit in the language of the Transportation Act by qualifying the "service" aim with the singular article "a," they would surely have said so at some point in the legislative process. More likely, the language was the fortuitous product of a simple literary choice.

Beyond this semantic concern, there are several deeper difficulties with interpreting the "service-to-all" clause as channeling the regulatory powers of the FCC toward maintenance of a franchised monopoly. First, as already noted, the lack of legislative history giving any kind of signal in this direction is forbidding. The entire purposes provision of the Act received less than cursory mention in the committee reports and debates.[192] Even admitting that resort to the legislative history is not always dispositive,[193] the overwhelming lack of attention paid to the language of section 1 by

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[188] See note 45 *supra*.

[189] Transportation (Esch-Cummins) Act of 1920, Pub. L. No. 152, ch. 91, § 500, 41 Stat. 499 (repealed 1934) (emphasis added).

[190] It should also be remembered that the Esch-Cummins Act instructed that *railroad* "competition shall be preserved as fully as possible" as well. *Id.* § 407(4). *See* text accompanying note 44 *supra*.

[191] *See* 47 U.S.C. § 151 (1970).

[192] See notes 175-77 *supra* and accompanying text.

[193] See note 182 *supra*.

Congress should discourage this kind of elaborate interpretation of unexplained statutory text.

Second, even granting that the definition of the goal of communications policy as service to all through "a communications service" indicates some deliberate congressional choice to authorize a statutory telecommunications monopoly, the full language of the "service-to-all" clause brings this argument toward the point of dissolving in ambiguity. This is so for two reasons. In the first place, the statutory aim is "a . . . communication service with adequate facilities at reasonable charges." This leaves some range for the existence of alternative communications providers. The technical and economic insulation provided by section 1 would not reach *all* competitive impacts; it would prohibit only those impacts which are serious enough to threaten that the facilities of the statutory network will be rendered inadequate or that the network's prices will be pushed to unreasonable levels. Up to the limits of "adequacy" and "reasonableness," there is statutory space for competitive entry.[194]

More important, the determination of what array of facilities is "adequate" and what level of pricing is "unreasonable" leaves the FCC with broad powers to say what the shape and extent of the statutory network is to be. The elasticity of the terms "adequate" and "reasonable," like that of the phrases "in the public interest,"[195] "just and reasonable"[196] and "public convenience and necessity"[197] in Title II of the Act, is practically boundless.[198] "Adequate facilities" may conceivably be those which are absolutely protected under the "technical harm" principle from technological decay or disruption from competitors' facilities, but that term may also mean something much less expansive. Although charges might be considered unreasonable if they exceed the equilibrium price of perfect competition, the statute does not mandate the lowest prices possible, just "reasonable" ones. As a result, the FCC is left with a wide degree of discretion in giving content to the terms of the "service-to-all" clause. To decide that the clause envisions the maintenance of a statutory communication network is to say little about how far the "adequate facilities" of the network are to extend or what considerations will be legitimate in developing a "reasonable" set of charges for communications services.

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[194] This limited form of competition differs from the traditional model of competitive services, to be sure, and those entering under this type of statutory authorization would be subject to double risks: not only would they in all likelihood fall prey to the superior size and range of competitive tactics open to the statutory network, but they would also be dependent on the consistency of the FCC determination of where the limits of "adequate facilities" and "reasonable charges" should be set.

[195] 47 U.S.C. § 201(a) (1970).

[196] *Id.* § 201(b).

[197] *Id.* § 214(c).

[198] *See* IV B. SCHWARTZ, *supra* note 12.

Moreover, even if the "service-to-all" clause is read as granting a statutory monopoly, the full language of the clause leaves much doubt about the scope of the "communication service" envisioned. The clause gives no clue as to what types of service or facilities are at the core of the statutory network, what types are on its perimeters, and what types (if any) are beyond it. It is simply not clear from the clauses whether simple terminal equipment or telephone handsets belong to the core or at the perimeter.[199] The answers must remain to be defined by the FCC, and answering them would carry the Commission beyond the issues of adequacy and reasonableness of network facilities and charges, to the fundamental determination of what is inside and what is outside the network. The text and history of section 1 are too meager to give useful guidance in this task and the end result does not differ much from the result of the more orthodox view of the Act: the Commission is left with something close to a plenary power to define the scope of the statutory network. That it would do so in the course of constructing the specific terms of the "service-to-all" clause rather than under the broader charter of the orthodox interpretation would be of little real consequence.[200]

Beyond these niceties of the construction and interpretation of the "service-to-all" clause, there is an even more compelling reason to reject the "statutory monopoly" view of section 1 when seen in light of the substantive provisions of the Act. Section 1 and the "service-to-all" clause apply not just to telecommunications but to broadcasting as well; the service called for by the clause includes both "wire and radio communication." This interpretation of section 1 would require the conclusion that a single monopoly was mandated by the Act to supply both telecommunications and *radio* service, since the "service-to-all" clause should be interpreted identically for both telecommunications and radio communications. Yet the provisions of Title III and the history of radio regulation both before and after the Act make it clear that no radio monopoly was to exist. The fundamental national policy toward radio communications was in 1934 and has always been to maintain a multiplicity of broadcast operators.[201] Reading section 1 in the manner proposed here would completely undermine that policy.[202]

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[199] This is evident from the FCC's lengthy and as yet unresolved computer inquiry. *See* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Final Decision), 28 F.C.C.2d 267 (1971), *aff'd in part, rev'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Tentative Decision), 28 F.C.C.2d 291 (1970); Notice of Inquiry, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 7 F.C.C.2d 11 (1966); Berman, *supra* note 129, at 169-78.

AT&T argues that data communications services, if not part of the monopoly franchise itself, should at least be part of the broad range of services which the statutory monopoly is permitted to offer. See note 157 *supra*.

[200] This is particularly true in the American system of administrative law, in which courts reviewing administrative actions usually defer to agency judgments about the meaning of ambiguities in the statutes they interpret. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). A reviewing court might say that the FCC interpretation of whether a certain type of service is inside or outside the statutory network is more readily challenged when the agency is interpreting the meaning of statutory language than when it is exercising judgment regarding technical or economic matters. But since courts are better trained in interpreting statutes than in reviewing discretionary judgments, in matters as complex as those involved in interconnection, specialized carriage and data transmission a court is likely to yield to the agency's view of the Act. *See* Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142, 1157 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976); *cf.* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641, 651 (D.C. Cir. 1973) (comments by Judges Leventhal and Bazelon on the difficulty of judicial review of complex issues of technology, in this case vehicle emissions standards under the Clean Air Act).

On examination, then, it should be apparent that there are formidable difficulties in attributing a wide-ranging substantive role in the law of telecommunications to the "service-to-all" clause of section 1. While the opening statement of purposes may be used to clarify statutory ambiguities,[203] the statement of statutory purposes in the case of the Communications Act is in many ways even more ambiguous than the regulatory standards which it attempts to define. Its ability to contribute to the analysis of the legal limits on FCC competitive policy is therefore marginal, and its place in the regulatory process is more likely to remain primarily hortatory.

2. *Fundamental Structural Change Under Section 215.* As a second ground of support for the new model, its proponents interpret several of the specific terms of Title II and conclude that fundamental changes in the structure of the telecommunications industry were reserved for congressional (and not administrative) action. Their argument relies heavily upon section 215 of the Act.[204]

Under section 215, three of the more controversial problems regarding the 1934 structure of the telephone and telegraph industries were reserved for later congressional consideration: the internal corporate structure of the AT&T system (centered on AT&T as the parent holding company for operating subsidiaries); the cross-industry competition caused by Bell's providing telegraph services; and the exclusive dealing arrangements of some carriers with their users.[205] The congressional sponsors of the section indicated that its purpose was to postpone consideration of these structural issues until the new FCC could investigate and "recommend . . . legislation for their solution."[206] The advocates of the franchised monopoly read section 215 to indicate that by postponing the consideration of these problems and by indicating that their solution was to come in the form of new legislation, the seventy-third Congress declared its intent to retain authority over basic structural change in telecommunications. As a result, the argument concludes, the power to reshape the industry was not delegated to the FCC but was reserved by Congress and therefore, the FCC's recent decisions opening the way for competitive offerings exceed the range of administrative actions authorized by the statute.[207]

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[201] *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1939) ("the Act recognizes that the field of broadcasting is one of free competition").

[202] But there may be an interesting parallel between the local geographic monopoly policy indicated by the Willis-Graham Act, see notes 69-72 *supra* and accompanying text, and the effective local wavelength monopoly granted to broadcast licensees. To the extent that both reflect a policy of local monopoly over basic telecommunications and broadcasting services, it is not inconsistent that wire and radio communications are joined in the section 1 statement of purposes while treated separately elsewhere in the Act.

[203] See note 168 *supra*.

[204] *See The Great Telephone Debate* 64.

[205] See note 127 *supra*.

As a threshold matter, there may be reason to discount the claim that the services authorized by the *Carterfone* and *Specialized Common Carrier* decisions threaten to produce a fundamental structural change requiring such Congress-only treatment.[208] But assuming for the moment that such a showing could be made, it appears that the section 215 reservations fall short of supporting the franchised monopoly view. In the first place, section 215 does not explicitly deprive the FCC of authority to make basic structural changes in the telecommunications industry, provided those actions are found to satisfy the overriding public interest standards of Title II. Nothing in the terms or legislative history of section 215 specifically precludes the interpretation that the Commission was to share with Congress concurrent jurisdiction over fundamental change. The fact that the section envisions the possibility of further legislation on the reserved problem areas need not mean that FCC activity in those areas was foreclosed; the section may have had a more modest aim of satisfying critics and defenders of the 1934 industry structure by the familiar compromise tactic of authorizing a thorough study of the problem by a newly-created expert agency. Given the legislators' explicit concern with creating a more effective regulatory body[209] and their failure to expressly limit that body's powers by section 215, the interpretation that best harmonizes the terms of that section with those of the entire Act would provide that both Congress and the FCC possess the power to fundamentally restructure the industry.

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[206] H.R. Rep. No. 1850, *supra* note 95, at 3.

[207] *See The Great Telephone Debate* 64 ("Section 215 represents one limit [on FCC discretion] in its reservation to the Congress of jurisdiction over problems of fundamental structural change"). This passage overstates the argument somewhat, since Congress always retains its jurisdiction; the issue is whether Congress declined to share that jurisdiction with the administrative agency.

[208] An economic analysis of this issue is beyond the scope of this Article. *See generally* FCC, Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures, *reprinted in* 61 F.C.C.2d 766 (1976).

[209] See text accompanying notes 114-23 *supra*.

Second, under traditional statutory interpretation, the reservations of authority in section 215 should be read to apply only to the three structural issues specifically mentioned in the provisions of the section. The development of federal telecommunications regulation strongly indicates that Congress delegated first to the ICC and then to the FCC the full extent of congressional authority over interstate commerce in telecommunications.[210] The most consistent explanation of this plenary delegation is that the Communications Act clothed the FCC with full authority to act as the agent of the legislature in accomplishing the public interest, subject only to the explicit reservations carved out of the delegation in section 215 and elsewhere. Under this interpretation, the argument made by proponents of the franchised monopoly model is undermined: in light of the broad grant of authority to the FCC, the reservation of congressional action over a set of specific problems cannot appropriately be generalized to declare an across-the-board congressional reservation of authority over fundamental structural change, to the exclusion of the agency charged with telecommunications regulation.

3. *The Legislative History.* In the legislative histories of the Communications Act and its sister Public Utility Holding Company Act of 1935,[211] the argument for the franchised monopoly model finds a third basis of support. Its proponents focus on floor remarks by the committee chairmen responsible for the 1934 Act and on comments at congressional hearings by one of the leading contemporary authorities on industry regulation as evidence that Congress undertook a careful reexamination of the telecommunications industry structure, including the expanding Bell monopoly, and concluded that the structure should not be changed.[212]

However, only a portion of the support claimed to exist in the legislative history can be gleaned from the general remarks made during the consideration of the Communications Act. Those remarks indicate merely that Congress recognized the effective monopoly possessed by AT&T in 1934. A prominent example is the comment of Senator Dill:

> I think it is generally well known by those who know anything about the set-up of the telephone monopoly, that under the present arrangement the parent telephone company, the American Telephone & Telegraph, not only owns the operating companies in the principal cities in the

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[210] See text accompanying notes 54-56, 141 *supra*.

[211] 15 U.S.C. § 79 (1970).

[212] *See, e.g.*, AT&T Memorandum, *supra* note 167, at E1357. Moreover, the AT&T Memorandum notes that the fact that in section 215(b) of the Act Congress instructed the FCC to investigate provision of telegraph service by telephone companies may show that Congress not only preserved the telephone monopoly, but also indicated concern over the most visible form of service competition then present—the competition between telephone and telegraph companies for record communications business. *Id.*

> United States . . . but it owns the manufacturing company, the Western Electric, which supplies the operating companies with the equipment of the telephone business, and there is no competitive bidding on the part of those who would sell equipment to the operating companies.[213]

Similar remarks were made by Congressman Rayburn.[214] The point is inarguable: Congress understood that the industry structure which had developed and which was to be subjected to FCC regulation was monopolistic. But it is equally obvious that none of the congressional statements in itself indicates particular enthusiasm for this monopoly structure; the statements represent a recognition of the fact that little competition existed, not a policy directed toward that result. Standing alone, the comments of the Act's sponsors tell little about the role envisioned for competitive services or facilities in the regulatory scheme.

The more forceful argument based on legislative history relies not on materials related to the Communications Act, but on the Public Utility Holding Company Act of 1935, by which Congress restructured the power industry by breaking up the holding companies which dominated electric and gas services.[215] During hearings on the 1935 Utility Act, the author of the extensive investigative report which laid the groundwork for the Communications Act, Dr. William Splawn, appeared before both Commerce Committees to explain his recommendation that utility holding companies be abolished.[216] In the House hearings, Splawn explained that organization of the power business on a national scale was unnecessary because "[t]he power business is not like the telephone business."[217] He expanded on this conclusion six weeks later at the Senate hearings:

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[213] 78 CONG. REC. 8824 (1934).

[214] *Id.* 10314 ("The competition in the industry will run about as follows: Telephone: American Telephone & Telegraph Co., 95 percent of the business; 100 independent companies, 5 percent of the business . . . . In telephone service the American Telephone & Telegraph is practically a monopoly").

[215] *See generally Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935); *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Commerce*, 74th Cong., 1st Sess. (1935); J. BONBRIGHT & G. MEANS, THE HOLDING COMPANY 90-222 (1932).

[216] *See* SPLAWN REPORT, *supra* note 89. Splawn was appointed pursuant to a 1932 resolution to investigate the holding company structure of the railroad, oil pipelining, communications and power industries. By the time of the 1935 hearings he had been named an Interstate Commerce Commissioner, but the bulk of the utility investigation had been carried out before Splawn left his position as counsel to the House committee. *See Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 55.

[217] *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 180, *quoted in* Petition for Writ of Certiorari 80, AT&T v. United States, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977). But see text accompanying note 222 *infra*.

> Someone seems to have had a dream that the electric power business could be organized corporately and conducted very much as the telephone business is. Now there is quite a difference in the physical operation of the two. The telephone, in order to be most useful, must be connected through switchboards with every other switchboard in the entire country.[218]

Relying upon distinctions drawn in the Splawn testimony and the treatment of industry structure by the 1934 and 1935 Acts,[219] proponents of the franchised monopoly reading of the Communications Act conclude that Congress decided to freeze the monopolistic market structure, subjecting it to pervasive regulation, rather than change it in the dramatic way in which the breakup of electric and gas utility holding companies was accomplished.

The Splawn remarks do lend credence to this conclusion particularly given Splawn's central role in the development of telecommunications legislation during the New Deal era. Viewed in their entirety, however, both Splawn's comments and the holding company divestiture requirements of the 1935 Act are considerably less than compelling evidence that the Communications Act was aimed at foreclosing telecommunications competition.

In the first place, the dichotomy alluded to by Splawn was not, as the incomplete quotation of his remarks suggests, simply between the power and the telephone industries. In its full context, the sentence partially quoted above[220] reads: "The power business is not like the telephone business *or the railroad business*, transcontinental or essentially an interstate proposition."[221] This linking of the telephone and railroad industries belies an interpretation of the Splawn testimony as supporting the franchised monopoly view. Because railroad regulation did not treat new competition as inimical, at least prior to the decline of the rails brought about by the advent of air transportation, the contrast drawn by Splawn between the power, telephone and railroad industries can hardly constitute prima facie proof that the divergent legislative approaches taken by Congress in 1934 and 1935 express adoption of the new model's "true faith."

Indeed, the full context of the Splawn testimony shows that a welter of factors entered into the congressional judgment that electric and gas utility holding companies served no useful end. Starting with the sentence just discussed, Splawn told the House Committee:

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[218] *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 75.

[219] While the 1934 Communications Act left the structure of telecommunications unchanged—with AT&T operating long-distance lines and holding control of its operating subsidiaries—the 1935 Public Utility Act ordered divestiture by the utility holding companies of manufacturing and operating subsidiaries. *See* 15 U.S.C. § 79k (1970).

[220] See text accompanying note 217 *supra*.

[221] *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 180.

> The power business is not like the telephone business *or the railroad business*, transcontinental or essentially an interstate proposition. Its operations are at the most regional. Many of the soundest operations are altogether intrastate and may be designated as local . . . . This is an industry which is essentially *local* and which . . . should be managed locally, and therefore regulated locally . . . .
>
> . . . [Earlier testimony] has shown you the *abuses* that have grown out of these interregional holding-company activities . . . . [T]o reach all of these abuses, you will have about 32 different bills or different sorts of approach . . . .
>
> . . . [W]hen you try to reach out to regulate them [rather than breaking up the holding companies] . . . , [y]ou would not be regulating public utilities. They are often not operating anything, but *merely hold securities*.[222]

At the Senate hearings, Splawn went on in the passage from his Senate testimony partially quoted above[223] to describe, in addition to technical interconnection differences, differences in the corporate operations of the telephone and power industries that called for different legislative treatment:

> Now, there is quite a difference in the physical operation of the two. The telephone, in order to be most useful, must be connected through switchboards with every other switchboard in the entire country. And you find in that industry a holding-operating company, *rather close to the operations which you are undertaking to regulate through your agency, the Federal Communications Commission.*
>
> But in the power field there is no such situation or transcontinental transmission of power. . . . The physical set-up in this operation is local and, at most, regional. There is *nothing Nation-wide* about this set-up except the corporate structure, the intangible thing superimposed upon these local physical operations.[224]

Thus, Splawn distinguished the differing needs for structural change in the telephone and power businesses on at least four grounds. First, there were technological differences dictating nationwide interconnection of telecommunications services and facilities which were not present for the still-embryonic electric power system. Second, there was an underlying sentiment, akin to a federalism concern, that an industry which was truly local in every way but its ownership should be regulated by states or municipalities; rather than intervene to regulate the industry because it was held in interstate conglomerations, the federal government should dismantle the industry's unproductive interstate characteristics. Third, there existed in the power industry a record of abuses by the electric and gas utility holding companies which aroused the ire of the congressional committees and which had no apparent counterpart in the telecommunications industry.[225] Finally, there were important differences in Splawn's comparison of the corporate arrangement of AT&T and the utility holding companies: while the latter "merely h[e]ld securities" while "not operating anything,"[226] the AT&T holding company was not only "rather close to the operations"[227] of the subsidiaries whose securities it held, but also actively engaged in operating the AT&T long distance lines. It was not a "mere paper company"[228] that transformed local into regional activity purely for the sake of enlarging its economic holdings and control.

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[222] *Id.* 180-81 (emphasis added).

[223] See text accompanying note 218 *supra*.

[224] *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 75.

Given the lack of technical or service functions and the abusive conduct of the utility holding companies, it is understandable why Splawn and the 1935 Congress chose to reshape the power industry radically, only a year after following a more conservative course in the Communications Act. The two industries were not similarly situated, for reasons that were more complex and more immediate than the economic explanation that the telephone business inclines toward a centralized, nation-wide monopoly while the electric and gas utility service requires only local and independent monopoly providers.

This is not to say that the divergent concepts of optimum industry structures present in the Splawn testimony and in the 1934 and 1935 Acts have no significance. But it is important to place the genesis of those differing concepts in full context. Doing so illustrates that from the standpoint of legislative history, the fact that Congress ordered the amputation of centralized ownership in the electric and gas industries while leaving the 1934 structure of the telecommunications industry intact cannot be explained entirely, or even primarily, by the view that Congress endorsed the franchised monopoly model in the Communications Act but did not do so in the Public Utility Holding Company Act of 1935. While the floor remarks concerning the Communications Act and the contrast between treatment of telecommunications and power industry structures may help to illuminate the general environment in which the Act was passed, neither is very strongly indicative of the franchised monopoly model.

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[225] Power industry abuses are noted throughout the 1935 hearings. That there were few comparable contemporary abuses by telecommunications holding companies—*i.e.*, AT&T—is indicated by the relative lack of allegations of abuse in the Communication Act hearings and debates. See notes 33 & 38 *supra*, notes 110-48 *supra* and accompanying text.

[226] See text accompanying note 221 *supra*.

[227] See text accompanying note 223 *supra*.

[228] *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 215, at 180.

4. *The Expression of the 1934 Milieu: The "Common Carrier Concept."* Although the foregoing arguments regarding the "service-to-all" clause, section 215 and the legislative history are important cornerstones of the franchised monopoly model, the core of the vision of the "true faith" lies elsewhere, in an organizing concept which assertedly has governed the development of telecommunications regulation from its earliest stages and which found expression in the general plan of Title II.[229] By providing the broadest and most accurate reflection of the universal understandings and expectations of the period in which the 1934 Act was formulated, it is argued, this concept announces a theory of industry structure that is incompatible with the basic premises of competitive theory, leading to the conclusion that Title II is "inconsistent with the notion that Congress intended that reliance would be placed upon competition to govern the provision of telecommunications service."[230]

In its most succinct form, the "common carrier concept" asserts that "the theory of competition cannot rationally be applied to products or services, the provision of which has been made subject to pervasive regulation."[231] As with the application of most core concepts, the consequences of this common carrier ideal for substantive regulatory rules are occasionally diffuse and difficult to penetrate. But, as articulated by its proponents, the concept is as blunt and simple as it sounds: the congressional decision to engage in regulation of telecommunications carriers, once beyond the threshold of pervasiveness, inevitably precludes competition in the regulated field. Thus, the choice to open the telecommunications field to competitive entry by new providers would be outside the principles of the "common carrier concept" and beyond FCC authority.[232]

The source of this concept is found in a panoramic view of the development of the telecommunications industry structure prior to 1934.[233]

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[229] *See generally* AT&T Memorandum, *supra* note 167, at E1357; *The Great Telephone Debate* 65; Petition for Writ of Certiorari, *supra* note 217, at 70-83; Brief for NARUC, *supra* note 10.

[230] AT&T Memorandum, *supra* note 167, at E1357.

[231] Petition for Writ of Certiorari, *supra* note 217, at 74, 83. A slightly less all-encompassing version of the concept is offered in *The Great Telephone Debate*. *Cf.* Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974): "The whole theory of licensing and regulation by government agencies is based on the belief that competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy."

[232] Similarly, carriers would be immunized from competitive scrutiny under the antitrust laws. *See* AT&T v. United States, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977) (Communications Act and regulatory powers of the FCC do not give implied immunity from antitrust laws to the companies operating under them).

[233] It has been suggested that taking this panoramic view moves the discussion to a "deeper and more jurisprudential" level. *The Great Telephone Debate* 65. There is a sense in which the effort to bring into focus the context in which Congress acted has something of a more "jurisprudential" character than the rather close attention to the language of the statute

From the pattern in the early decades of this century of increasing industry consolidation and state regulation and decreasing competition,[234] AT&T had forged a centrally planned and operated partnership with the independent companies which provided nationwide telephone service. Throughout this period, Congress was aware of—and had even encouraged[235]—this monopolistic course. In 1934, by way of the Splawn investigation, Congress assessed this development and embraced the no-competition principle of the common carrier concept by electing to retain the monopoly structure and subject it to comprehensive regulation. Thus, one commentator noted:

> If one looks at the statute in its full context of practice and habit over a period of 35 years as an integral part of the process of making decisions of communications policy . . . it is obvious that Congress could have had no other goal in mind, because a unified telephone network had existed for a long time before the Act; it existed at the time the Act was passed; and its legitimacy was not challenged until 1968. The unified network was the universal expectation reflected in the Act.[236]

There is a strong appeal to this "totality of the circumstances" type of approach, not the least part of which comes from the intuitive sense that had the Congress intended in 1934 to alter this monopolistic course, it would have done so. But there are flaws in the argument that raise doubts about the strength with which it supports the principles of the franchised monopoly model.

Most important, the argument is overstated. In suggesting that pervasive regulation necessarily carries with it the intent to freeze out competitive entry into monopolistic market structures, the argument goes a step further than the fact of regulation alone will propel it. The primary meaning of the legislative choice to engage in comprehensive regulation is that the final locus of authority over decisions affecting the price, availability and delivery of the regulated services should reside in a public body, not in private hands. The fact of extensive regulation does not of itself lead to the conclusion that a specific industry structure is mandated. Pervasive regulation is no more than just that: the commitment of the development of the regulated field to the comprehensive oversight of the public agency. It need not mean that the only proper subjects for regulation are monopoly providers.

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and to supporting legislative documents. But it is important to remember two things. First, care must be taken not to confuse deep jurisprudence with stratospheric musings. Second, while there is an important need for recourse to the temper of the times in which legislation was enacted, the more reliable mode of ascertaining legislative intent remains the examination of the contemporary official records and materials. Calling an approach "more jurisprudential" does not automatically make it the preferred technique of legal analysis.

[234] See text accompanying note 15 *supra*.

[235] See text accompanying notes 57-72 *supra* (discussing Willis-Graham Act merger authorization).

[236] *The Great Telephone Debate* 65.

This is not to say that the "common carrier concept" has no substantive content with regard to the roles of monopoly and competition in the regulatory process. The undertaking of pervasive regulation of an industry in which monopolies are already in place and in which the elements of natural monopoly are strong does indicate that the practice of relying on competitive forces alone to guide industry development has been judged insufficient to promote the public interest. The existence of monopoly structures is therefore to be expected. But the most that can be deduced reliably from the adoption of a sweeping regulatory scheme is that the usual presumption against monopolistic economic structures has been foregone by the legislature. The deduction cannot be stretched to the point that competition in the regulated field is conclusively outlawed. Even assuming arguendo that pervasive regulation fully reverses the usual presumptions, making monopoly favored and competition disfavored, the choice to follow a competitive course would still be open to the public regulatory authority, provided it concluded that those presumptions were overcome. Once even this limited form of agency discretion to create competitive markets or submarkets is conceded, the claim that the common carrier concept precludes competitive entry falters.[237]

Furthermore, reading the Communications Act to incorporate the expansive substantive view of the "common carrier concept" would require a questionable implication of statutory immunity from competition initiated under regulatory supervision. In the record there is nothing more than ambiguous support for this reading. Although the 1910, 1921 and 1934 deliberations include frequent recognitions of the monopolistic character of telephone service at that time,[238] substantive contours of that statement were seldom elaborated upon. The Willis-Graham policy of favoring local geographic monopolies in the provision of basic telephone services and facilities,[239] while displaying at least a narrow substantive tilt toward monopoly, does not itself reach so far or in as many directions into the industry structure as the franchised monopoly model would suggest. And while the 1934 Congress made no significant changes in industry structure, neither did it embrace the existing structure with enthusiasm.[240] As is clear from the manner in which it was advanced,[241] the expansive "true faith" form of the common carrier concept can be discovered only by implication from the overall course of telecommunications regulation.

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[237] This understanding of the consequences of extensive regulation is illustrated by the leading Supreme Court case on telecommunications competition, FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). In a passage frequently cited by the advocates of the franchised monopoly model, ***see, e.g.***, Petition for Writ of Certiorari, ***supra*** note 217, at 83; AT&T Memorandum, ***supra*** note 167, at E1357, the Court noted that "[t]he very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications." 346 U.S. at 93. This language falls well short of disapproving the use of competition as a tool for regulating telecommunications. It explicitly goes no further than to dismantle the presumption that monopoly structures are unlawful; it does not cast competition into disfavor, much less foreclose its use entirely. The Court subsequently stated that "the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support." ***Id.***

[238] See text accompanying notes 27-28, 66-67, & 131 ***supra***.

[239] See text accompanying notes 69-77 ***supra***.

In light of the overall federal policy favoring competition, such implications should rarely be given the force of law. As the Supreme Court has held where comprehensive regulation has been argued as a defense to antitrust complaints, implied repeal of federal procompetition policies by regulatory statute should be "strongly disfavored" and should "only [be] found in cases of plain repugnancy between the [competitive] antitrust regulatory provisions."[242] The policies underlying this rule in the antitrust area are even more visible where the issue is implied restriction of *agency* discretion to use competition as a regulatory tool, rather than repeal of *judicial* jurisdiction over activity which is subject to simultaneous administrative regulation.[243] While there is great potential for institutional conflict and inconsistent policy direction when both regulators and courts exercise simultaneous authority over private activity, no such threat is posed by permitting the agency to consider the degree of competition in the industry in determining what regulatory actions to take. Any inconsistencies between the dictates of competitive and monopolistic policies may be mediated by the agency through application of its broad public interest standard; a finding that certain activities would have anticompetitive effects may nevertheless be consistent with the regulators' view of the public interest and therefore need not control the agency's actions.[244] Thus, although a colorable argument can be made that regulated entities should be immune from antitrust suits based on actions in which regulatory agencies have approved or acquiesced, no similar immunity from agency-supervised competition can be implied from the fact of regulation. Indeed, if the regulated entity obtains immunity from judicial regulation of market structure under the antitrust laws, agency authority to regulate market structure becomes doubly important in a system which is leery of unregulated telecommunications markets. Agency discretion to employ competition in that task should remain unfettered unless the legislature clearly indicates otherwise.

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[240] See text accompanying notes 213-14 *supra*.

[241] *See, e.g.*, *The Great Telephone Debate*; Petition for Writ of Certiorari, *supra* note 217.

[242] Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1974).

[243] The former constitutes the centerpiece of the challenge to the FCC procompetition decisions. The latter is the centerpiece of the defense in the current antitrust action brought by the Justice Department against AT&T. In that action—the more attractive one for accepting the implied immunity argument, since it concerns judicial regulation—the courts have rejected AT&T's claim of immunity. See note 100 *supra*.

[244] Indeed, the Supreme Court has ruled that such a finding alone *cannot* control the administrative decision. See the discussion of FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), at note 237 *supra*.

The "common carrier concept" of the "true faith" would curtail that discretion, not on the basis of the express intent of the Act, but by implication from its overall scheme. Using the "plain repugnancy" test of the antitrust cases,[245] the implication is without merit. Even if the presumptions against monopoly are withdrawn by pervasive regulation, there can be nothing plainly repugnant to the Communications Act's task of public interest regulation for the FCC to regulate with the aim of introducing increased competition into the telecommunications industry. Without stronger roots for doing so in the express terms of the Act,[246] authorization of competition cannot be ousted from the Commission's regulatory repertoire by the simple regulation-means-monopoly formula of the "true faith" common carrier concept.

There is a further problem with this concept. To a large extent, its strong intuitive appeal rests on the view that in the "social milieu which precipitated congressional action"[247] in 1934, the milieu which permitted members of Congress to remark casually and without elaboration that the telephone industry is a "vast monopoly,"[248] it was self-evident that most forms of competition were inappropriate. As an empirical matter, there is enough evidence of contrariety in the record to raise doubts about whether this self-evident notion extended very far at all.[249] But to focus on the empirical validity of this view largely misses the point of asking what the Communications Act means in relation to monopoly and competition.

In today's communications environment what was self-evident in 1934 is no longer self-evident at all. The scope of information resources to which the Communications Act must apply has been transformed by the modern technology explosion and the merger of modes of communications exemplified by compunications, cable broadcasting and microwave systems. How national goals of making available "adequate facilities at reasonable charges," "national defense" and "promoting safety of life and property" will be advanced in this new enviornment—assuming that those remain the central requirements of present and future communications services—cannot be answered with any meaning by reference to whatever underlying sense of things existed in 1934, regardless of whether that sense tilted toward monopoly or toward competition. The risks of ossification are already large enough in a system where communications regulation is controlled by legal concepts designed for the problems of nineteenth century barge and rail traffic.[250] If it is the case that an abstract "common carrier concept" made the self-evident understandings of the early era of communications technology dispositive with regard to the telecommunications industry structure, the regulatory process established by the Communications Act would be exposed to even greater incapacity to deal with dramatic new developments within its jurisdiction.

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[245] See text accompanying note 242 *supra*.

[246] Again, it should be noted that legislation to provide such express roots has been introduced in the 95th Congress. *See* note 10 *supra*.

[247] Brief for NARUC, *supra* note 10, at 30.

[248] S. Rep. No. 781, *supra* note 95, at 2.

[249] See notes 131-38 *supra*.

There is no good reason to think the Communications Act was intended to reach this result. The much more reasonable view of the Act is that its aim was to create a durable mechanism for shaping the development of the evolving telecommunications industry to ends determined in the final analysis by public rather than private interests. Tying that mechanism to the structure of the industry that existed when it was created—by virtue of a "common carrier concept" or otherwise—would run counter to the fundamental purposes of public regulation. If there is any "more jurisprudential" way to think about the Communications Act,[251] that should be it.

V. CONCLUSION: COMMUNICATIONS LAW AND POLICY

To the uninitiated, the debate over the original intent of the Communications Act may seem arcane and antiquated.[252] But it is a debate that matters. It matters to courts charged with the unenviable task of divining the policy in the existing communications laws to deal with problems that go to the heart of industry structure. It matters to legislators who are being asked to "reaffirm" the basic policy of the Act by partisans who offer diametrically opposite views of what that basic policy was. And it matters to the regulatory agencies: to the FCC, whose job it is to apply statutory communications policy in the first instance, and to state regulators, whose range of authority in the imprecise balance between state and federal control of communications developments is at stake in important ways. Until the Communications Act is revamped or replaced, or until the Supreme Court chooses to speak, the search for the original intent will remain the central preoccupation in the challenge to the FCC competition decisions.

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[250] See text accompanying note 41 *supra*. *See* Berman, *supra* note 129, at 165. *See also* Washington Util. & Transp. Co. v. FCC, 513 F.2d 1142, 1157 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976) ("Regulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future").

[251] See note 233 *supra*.

[252] As one exponent of the "true faith" puts it, "[a]rguments about 'original intent' are usually pedantic and rather unconvincing at best." *The Great Telephone Debate* 65. *See also* Letter from Donald I. Baker, Assistant Attorney General, to Rep. Timothy R. Wirth (Jan. 18, 1977), *reprinted in* 123 CONG. REC. E409 (daily ed., Jan. 27, 1977) ("the legislative history of broad, general statutes enacted nearly a half a century before is unlikely to be dispositive of many present day questions").

There are two conclusions to draw from the search. First, to the extent that a judgment is permissible, the more convincing view of the Act is that it contains no per se prohibition on FCC discretion to follow a policy of introducing competition in telecommunications. From a purely legal point of view, there are no persuasive reasons to find that the broad FCC discretion found in the traditional view of the Act heretically distorts the "true faith."

The second conclusion is that there can be no great confidence in the first. The search for the Act's original intent offers little promise of discovery; neither the statute nor its legislative history provide much useful guidance. The relevant law is more to be fashioned than found.

At this point, the search for the law of telecommunications underlying the FCC's procompetitive line of decisions comes full circle: the elucidation of what the terms of the Communications Act mean for this area of policy formulation ultimately comes to rest on questions which have more to do with policy and political judgments than on legal sources and methods. Some of the questions—such as who is to make the decisions on market structure—involve structural issues about the regulatory process. Some—such as what is the correct policy to follow— involve substantive issues that draw on extra-legal factors for resolution. But all of them reflect a balancing of options and consequences that is fundamentally political and for which the Communications Act as presently written can only provide a backdrop.

Both the FCC and the players it regulates—as well as the courts which review the outcome—deserve better from Congress. In the 100 years since Alexander Graham Bell launched the telecommunications revolution, Congress has never once given even superficial attention to the unique set of problems and potentials presented by the telephone and its descendents. Whether or not it takes the brute force of the established carriers or the development of a crisis to spur a thorough legislative consideration of this aspect of information resources policy, the first order of responsibility for policy-oriented judgments of the type underlying the *Carterfone* and *Specialized Common Carrier* decisions remains with Congress. If the Communications Act and its predecessors teach any enduring lesson, it is that this responsibility has yet to be discharged.

The Power of the Press: A Problem for Our Democracy*

MAX M. KAMPELMAN

Attention to power is indispensable for an understanding of the role of the media in our democratic society. Political scientists have rightfully written for years about the abuses of executive power and congressional power. The critical question for our democracy today, however, is not so much the power of the Presidency, which is restrained by the Congress, the opposing political party, the press and the courts; nor so much the power of the Congress, which is restrained by the President, by partisan politics, by the press and by the courts. The relatively unrestrained power of the media may well represent an even greater challenge to our democracy.

Power itself is not antithetical to a democracy. Power is manageable as long as it is properly restrained. There are, of course, definite restraints on the power of the President and on the power of the Congress. The genius of the American polity, in fact, has been its ability to balance various elements of power. Powerful corporations and unions restrain one another and both are restrained by government and by laws. The American press, however, perhaps the second most powerful institution in the country next to the Presidency, is characterized by few, if any, effective restraints.[1]

Press Freedom – An Essential Liberty

Freedom of the press is essential to political liberty. A society of self-governing people is possible only if the people are informed, hence the right to exchange and print words. Where men cannot freely convey their thoughts to one another, no freedom is secure. But what if that freedom is used in a vulgar, cynical, immoral, dishonest, libelous, obscene, or seditious manner? Is it not true that no man is free if he can be terrorized by his neighbor? And, is it not possible for words as

[1] It is interesting that a survey taken in 1974 by *U.S. News & World Report* showed that a cross section of national leaders ranked television ahead of the White House as the country's number one power center. Kevin Phillips, *Mediacracy* (Garden City, New York: Doubleday, 1975) p. 25.

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*Max Kampelman in Policy Review, vol. 6, Fall 1978 : 7–39. Reprinted with permission of the Heritage Foundation, 513 C Street, N.E., Washington, D.C. 20002. Copyright 1978.

well as swords to terrorize? Furthermore, can a citizen be truly informed if falsehoods come masqueraded as truths? Is it not true that the abuse of liberty can destroy liberty? And, is a democratic society unable to defend itself against these kinds of threats to its internal welfare and safety?

The First Amendment to the Constitution, guaranteeing the rights of free press and free speech, is not exclusive.[2] Rather, it is part of a series of constitutional protections. What happens when these rights conflict with one another? For example, if the right to a fair trial is fundamental to liberty, what happens to it if the press is free to prejudice a fair trial by what it publishes?[3]

The press (both print and electronic) is very jealous of what it asserts as its right to protect its sources of information. At a press conference in Washington, Dan Rather asserted that the right was "not for the benefit of reporters. It is for the benefit of listeners and viewers and readers. . . . The cause is America."[4] This is related to a newly-articulated "public's right to know." But what about the public's right to know the sources of news stories? Are the media insisting on a degree of confidentiality which they deny to the government? Does it not seem incongruous for a private, profit-making enterprise, such as the media, to have a greater right of confidentiality than a democratically-elected government?

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[2] It should be noted that when the framers of the Constitution considered the idea of freedom of the press, they did not envision a press possessed of very nearly unrestrained license. The concept of an unrestrained press was foreign to the liberal philosophers of the 17th and 18th centuries. The idea of freedom without responsibility was also foreign to the experience of the Founding Fathers. When the First Amendment provided that "Congress shall make no law" abridging the stated freedoms, it was clearly intended that it was the national government that would be subject to that prohibition rather than the states. Indeed, Pennsylvania, Delaware and Virginia expressly imposed liabilities for abuses of free speech. Thomas Jefferson explained: "While we deny that Congress have the right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so." (Letter to Abigail Adams, September 4, 1804).

After the passage of the Sedition Act, however, and with the reaction to it, restraints against the press were gradually removed. The Supreme Court came to interpret the Fourteenth Amendment as extending the rights protected under the First Amendment against restrictions by the states as well as the national government. More recently, court decisions have begun to lessen libel laws as a restraint against the press; and in the Pentagon Papers case, the press was allowed to publish stolen government documents without restraint or liability. (*New York Times Co. v. United States*, 403 U.S., 1971, p. 713).

[3] As this article was going to press, *The New York Times – Myron Farber* case, in which the *Times* reporter and his paper are arguing for First Amendment immunity for the reporter's notes, was being debated.

[4] Tom Bethell and Charles Peters, "The Imperial Press," *Washington Monthly*, November 1976, p. 29.

During recent years, the media have been filled with headlines about the alleged misdeeds of the CIA. There are a number of important questions at issue. Are there, for example, too many intelligence agencies functioning and vying for power? How does one balance the competing claims of individual freedom and national security? How is authority to be exercised over intelligence services? How are intelligence operations to be kept nonpolitical? How is freedom of the press to be preserved while preventing irresponsible dissemination of classified information? Indeed, how can a government, be it democratic or not, operate without secrecy?

These serious questions require careful consideration by the press and an informed public as well as by the institutions of government. Headlines and sensational scoops, however, do not, in themselves, contribute to democratic, rational debate, while at the same time they may well serve to damage the nation's intelligence structure. There is a need for some secrecy in government. We would all agree, for example, that troop movements and military installations fall into that category. There are other "secrets" that can perhaps safely be made public. But how are we to recognize which is which? Are the media claiming for themselves the right to decide which leaks are in the public interest and which are not?

Other powerful institutions in our society are required to exercise their power responsibly. Is the press, surely one of the more powerful institutions of our society, not also accountable for what it does? I am reminded here of the statement of Stanley Baldwin, who, as Prime Minister of Great Britain, was vehemently attacked by Lord Rothermere and Lord Beaverbrook, press magnates of that day. Mr. Baldwin replied, "What the proprietorship of these papers is aiming at is power, and power without responsibility – the prerogative of the harlot throughout the ages."[5] Obviously, the awesome power of the press, protected by its constitutional freedom, can be abused: good men may be slandered; justice may be thwarted; base passions may be aroused; people may be misinformed; and government may be weakened.

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[5] Speech by Stanley Baldwin, Westminster, March 17, 1931.

Felix Frankfurter once wrote, "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise." He went on to warn, "Nor can the limits of power which enforce responsibility be finally determined by the limited power itself."[6]

The Press As A Business

In addressing ourselves to some of these questions of the media's rights and responsibilities, their power and possible abuse of power, it is important to note that as the media have grown more powerful, they have also become more business and profit oriented. Ben Bagdikian, the distinguished newspaperman and newspaper critic, reports that when he was writing his book on the media industry, he found that average profits for that industry were 76 percent higher than those of all other American industries.[7] *The Washington Post* has published a financial profile of 13 leading public newspaper firms showing an average 35.8 percent increase in net income from 1975 to 1976.[8]

Profits are not inimical to a democratic society, just as power is not antithetical to a democratic society. But these figures are important and revealing as we note that the press is not only an institution designed to provide the principal means of communication and the exchange of ideas in our body politic, but (unlike almost all universities, for example) it is also an institution of business and profit for those who own newspapers, television stations and so forth. In terms of employment, the newspaper industry today is America's third largest manufacturer, behind only automobiles and steel.[9]

As early as 1920, Walter Lippmann wrote of the tremendous power of the press:

The news of the day as it reaches the newspaper office is

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[6] *Pennekamp v. Florida*, 328 U.S., 1946, pp. 331 and 355-56, (concurring opinion).

[7] Ben H. Bagdikian, *The Effete Conspiracy: and Other Crimes by the Press* (New York: Harper & Row, 1972) p. 6.

[8] *Washington Post*, August 3, 1977, p. D13, col. 3.

[9] *Washington Post*, July 24, 1977, p. G1, col. 3.

> an incredible medley of facts, propaganda, rumor, suspicion, clues, hopes and fears . . . The power to determine each day what shall seem important and what shall be neglected is a power unlike any that has been exercised since the Pope lost his hold on the secular mind.[10]

Indeed, as Douglass Cater has more recently pointed out, those words and events, considered newsworthy by those who have staged them, might as well not have occurred if they fail to get projected and selected by the media.[11]

There was a time when the awesome power of the press faced the restraint of competition. That restraining influence, however, is disappearing. There are, today, fewer than 45 cities with two or more competing dailies and about 1,500 cities with a noncompetitive daily press; and each year more and more noncompetitive dailies are being swallowed up by the large corporate chains. *The Washington Post* reported in the summer of 1977 that within two decades "virtually all daily newspapers in America will be owned by perhaps fewer than two dozen major communications conglomerates."[12] Today, 72 percent of daily and 80 percent of Sunday newspaper circulation is controlled by companies with two or more dailies.[13] As John B. Oakes, former senior editor of *The New York Times* observed, "The perception of the press as more interested in private profit than public service is strengthened when it lobbies for special privilege and exemption from, for example, the antitrust laws – as it did in connection with the Failing Newspaper Act a few years ago."[14]

The problem is a real one. Walter Lippmann said, "A free press exists only where newspaper readers have access to other newspapers which are competitors and rivals so that editorial comment and news reports can – regularly and promptly – be compared, verified and validated. A press monopoly is incompatible with the free press."[15] Lippmann's warning is more pertinent now than then. Ninety-six percent of the daily newspaper cities in the country have only one newspaper. In 1910, 100 million Americans were served by 2,400 newspapers; today, 220 million are served by 1,775.[16] Sixty percent of all the individual newspapers in the country are owned by chains, compared to 30 percent in 1960.[17]

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[10] Irving Kristol, "The Underdeveloped Profession," *The Public Interest*, Winter 1967, pp. 49-50.

[11] Douglass Cater, "Remarks," in G. Will, ed., *Press, Politics, and Popular Government* (Washington, D.C.: American Enterprise for Public Policy Research, 1972) pp. 33-34.

[12] *Washington Post*, July 24, 1977, p. G1, col. 3.

[13] *Washington Post*, May 9, 1978, p. D10, col. 1.

[14] John B. Oakes, "Dwindling Faith in the Press," *New York Times*, May 24, 1978, p. A23, col. 3.

And the chains are getting bigger. Today the top 25 chains have more than 52 percent of total press circulation, compared to 38 percent in 1960. It is indeed true that (in the realm of newspaper concentration), "never before has so much been under the control of so few."[18] And now the chains are buying other chains. Most recently, for example, the 30-newspaper Newhouse chain purchased the eight Booth newspapers for $305 million, the largest newspaper transaction in history.[19] On May 8, 1978, Gannett Company and Combined Communications Corporation announced plans to merge in a $370 million exchange of stock, which, if consummated, would be even larger. The resulting parent company would be the publisher of 79 daily and 6 weekly newspapers; the owner of 21 radio and television stations, newsprint interests, the polling firm of Louis Harris and Associates; and a major force in outdoor advertising.[20]

Today's press is a far cry from the fragile printing presses that the Bill of Rights was designed to safeguard. The Washington Post Company is a vivid illustration of the change, with its 1977 revenues of $436 million and its until recently five-level presence in the nation's capital – as owner of a newspaper, a radio station, a television station, a national news magazine, and a major news service.[21] CBS, in addition to its radio and television properties, controls 15 to 20 percent of the mass paperback book market. Time, Inc., besides its magazine and book publishing activities, owns a television station and television production company. It is in the process of buying a Denver cable television system for $143 million and the Book-of-the-Month Club for $63 million, and just purchased *The Washington Star* for $20 million.[22] In sum, today the press is among the most profitable business groups in America, with 15 public companies that own newspapers producing operating revenues of more than $100 million each in 1977, led by the Times-Mirror Company, publisher of *The Los Angeles Times*, with more than $1 billion.[23]

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[15] Donald McDonald, "The Media's Conflict of Interests," *Center Magazine*, November/December 1976, p. 16.

[16] *Ibid.*, p. 18.

[17] Ben H. Bagdikian, "Newspaper Mergers – The Final Phase," *Columbia Journalism Review*, March/April 1977, p. 18.

[18] *Ibid.*, p. 19.

[19] *Ibid.*, p. 18.

[20] *Washington Post*, May 9, 1978, p. D8, col. 1.

[21] The Washington Post Company has announced that it plans to sell its Washington am radio station to the Outlet Company of Providence, Rhode Island, and swap its Washington television station for one in Detroit, Michigan, owned by the Evening News Association. The Federal Communications Commission has approved both transactions,

The Laws of Libel

With competition less of a restraint on the power of the press, what about the courts and libel laws? Libel laws are today much less of a restraint as a result of *The New York Times Co.* v. *Sullivan*[24] (a case which was decided in 1964) and its progeny. In *Sullivan*, the Supreme Court held that public officials should sue and collect for libel only if the libel was uttered "with knowledge that it was false or with reckless disregard of whether it was false or not."[25] This double standard against public officials and in favor of newspapers was further broadened to include "public figures"[26] and then even private individuals who might be involved in "an issue of public or general concern."[27]

Subsequent Supreme Court pronouncements in *Gertz* v.

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and as of this writing the former swap has been accomplished and the the latter sale is imminent. *Washington Post*, December 7, 1977, p. A1, col. 5; Joanne Ostrow, "Ch. 9: Local News Once Removed," *Washington Journalism Review*, April/May 1978, p. 21; Charles B. Seib, "The First Amendment as Corporate Business," *Washington Post*, May 26, 1978, p. A21, col. 4.

[22] Address by Marvin L. Stone, Editor, *U.S. News & World Report*, "Journalism in Chains," 1977 Annual Meeting of the American Association of State Colleges and Universities, in Orlando, Florida, December 6, 1977, pp. 2-3; Joseph Volz, "Star Sold: As Time Goes Buy. . .," *Washington Journalism Review*, April/May 1978, p. 22.

[23] Seib, *supra* note 21.

[24] 376 U.S., 1964, p. 254.

[25] *Ibid.*, pp. 279-80.

[26] *Curtis Publishing Co.* v. *Butts*; *Associated Press* v. *Walker*, 388 U.S., 1967, p. 130.

[27] *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S., 1971, pp. 29 and 44.

Robert Welch, Inc.[28] and *Time, Inc.* v. *Firestone*[29] refined the libel laws vis-a-vis the press to the point where, in the words of Columbia Law Professor Alfred Hill:

> . . . at the present time media defendants cannot be held for defamation of public officers or public figures except for [illegible] that is willful or reckless (the *Sullivan* [illegible] cannot be held liable for defamation of private persons, or of public persons in their private capacities, except upon a showing of "fault," which probably is satisfied by proof of negligence (the *Gertz* rule).[30]

Two recent United States Court of Appeals decisions have marked even further expansions of the libel law umbrella offering protection to the press. In *Edwards* v. *National Audubon Society, Inc.*,[31] decided on May 25, 1977, the Second Circuit overruled a lower court decision which found a libel had been committed with malice by *The New York Times* in an article labeling certain scientists as "paid liars." The Court, without challenging the fact that the charge was false and without condoning "the mischievous and unwarranted assault on the good name" of the scientists, ruled that the reporting was justified because the charges were "newsworthy," regardless of their falsity![32]

The same Circuit Court again reversed a lower court decision on November 8, 1977, in *Herbert* v. *Lando*,[33] in which former Army Lieutenant Colonel Anthony Herbert sued for libel perpetrated in the production and dissemination of a CBS "60 Minutes" episode entitled "The Selling of Colonel Herbert." Notwithstanding the fact that under *Sullivan*, Colonel Herbert carried the burden of proving that the journalists acted with actual malice, the majority of three ruling judges held that Colonel Herbert could not make pre-trial discovery inquiries into the journalists' states of mind. The dissenting judge signed an opinion observing that the "notion that a plaintiff carrying such a burden should be denied the right to ask what the defendant's mental state was is remarkable on its face."[34] The press, not surprisingly, applauded the decision.[35] John P. Roche, however, more a professor than a journalist, summed up the practical result of the decision best when he wrote that it "makes the rule of malice simply a Catch-22, a logical cul-de-sac. If the Supreme Court accepts this weird formulation, public figures will be utterly defenseless."[36] Echoing that sentiment, a federal district judge, in apparently the first lower court case to rely on *Herbert*, suggested that the decision virtually rules out libel suits brought by public officials and rhetorically asked, "Are men and women of honor who happen to be public figures to right vicious dangers hereafter by resort to fisticuffs or dueling?"[37]

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[28] 418 U.S., 1974, p. 323.

[29] 424 U.S., 1976, p. 448.

[30] Alfred Hill, "Defamation and Privacy under the First Amendment," *Columbia Law Review*, v. 76, no. 8, December 1976, pp. 1205 and 1212.

[31] 556 F.2d, 1977, p. 113 (2d Cir.), *cert. denied*, 434 U.S., p. 1002.

[32] 556 F.2d, p. 122.

[33] 46 U.S.L.W., (2d Cir.) Nov. 7, 1977, No. 77-7142, p. 2251, *cert. granted*, 55 L. Ed. 2d, 1978, No. 77-1105, p. 515.

The doctrine of tortious invasion of privacy, closely linked but distinguishable from libel, has also proven to be most accommodating to the press. Reluctance on the part of the courts to restrain the media had its most visible manifestation in the 1975 Supreme Court decision of *Cox Broadcasting Corp. v. Cohn*.[38] In this case, defendant Cox Broadcasting published the name of a rape victim determined from examination of a public indictment, although a Georgia statute made it a misdemeanor to effect "public dissemination" of the identity of such a victim. In reversing Georgia's highest state court's determination that a cause of action for invasion of privacy would be appropriate, the Supreme Court sweepingly declared the immunity of the media from liability for truthfully reporting that which was available to the public in official court records. Implied in this ruling is the possibility that this policy could be extended to other public records as well.

The Growing Power of the Press

Ben Bagdikian, in commenting further on the power of the press, pointed out that nobody likes to make an enemy of the town crier. Not only, he said, is the press protected by the Constitution as it is now interpreted by the Supreme Court, but very often it has additional protection as government officials hesitate to apply other laws (such as antitrust laws) to the press. He writes, "The press is traditionally permitted to go further and is reprimanded more gently about corporate transgressions than are other enterprises."[39]

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[34] *Herbert v. Lando*, No. 77-7142, slip op, Nov. 7, 1977, pp. 264-265 (2d Cir.); *Wall Street Journal*, November 8, 1977, p. 8, col. 2.

[35] *Washington Post*, November 9, 1977, p. A22, col. 1.

[36] John P. Roche, "Libel Rulings Make Public Figures Unfair Game," *Washington Star*, November 23, 1977, p. A9, col. 5.

[37] Jerry Knight, "Judge Says Fighting is Only Libel Remedy," *Washington Post*, November 30, 1977, p. D11, col. 2.

[38] 420 U.S., 1975, p. 469.

What we see in the press is a powerful, ever-growing institution with huge financial resources to supplement the power it wields in its control over the dissemination of news, but with fewer and fewer restraints on that power. What should society do in the face of that power and the dangers arising out of its abuses? Believers in democracy, obviously, understand the dangers to a free society that would arise from attempts to impose government regulation as a method of correcting the abuses. The danger, however, is that unless the abuses are corrected, there may well be increasing demands within society for effective government restraints. What is left to consider, therefore, is whether or not self-restraint by the media is a likely alternative.

Professionalism is a form of self-restraint, particularly when it is accompanied by good intentions. Regrettably, however, we remember Irving Kristol's characterization of journalism as "the underdeveloped profession."[40] It is appropriate to analyze the actual functioning of the media in evaluating the extent of its professionalism.

Critics of the press have pointed out that the difficulties in accurately presenting information to the body politic begin with the very first principle of modern journalism. Schools of journalism teach that news stories must begin with a "lead," defined as "an attention arresting sentence." It is here that the process of distortion is likely to begin.

In television, this is accomplished by what Walter Cronkite recently called the "hypercompression" of the news. He said:

> We fall far short of presenting all or a good part of the news each day that a citizen would need to intelligently exercise his franchise in this democracy. So as he depends more and more on us, presumably the depth of knowledge of the average man diminishes. This clearly can lead to

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39. Bagdikian, *supra* note 7, p. 61.
40. Kristol, *supra* note 10, p. 36.

disaster in a democracy.[41]

The emphasis on drawing attention in order to sell newspapers, produce profits and gain influence is one of the serious problems faced by modern journalism. A recent issue of the *Columbia Journalism Review* highlights this troublesome trend with an article by Fergus M. Bordewich, "Supermarketing the Newspaper," that reports a growing emphasis on rapes, robberies and accidents. "Many papers are becoming so breezy you can hear the whistling through the holes where the news might have been."[42] In a frantic effort to recapture the attention of their readers, the press is now emphasizing what John B. Oakes terms "chewing gum for the brain." Oakes goes on to observe that "To the degree that this tendency downgrades those traditional mainstays of news, information and opinion which the First Amendment was obviously designed to protect, American journalism is weakening its moral if not its legal claim on the public to that special status it has rightly held in our society."[43]

A corollary to this is the editor's love for the "scoop." This adds to an already feverish drive for the sensational story and has a tendency to result in overplays that tend to distort not only the story itself, but the balance of news in our newspapers.

This distortion is also related to the growing importance of investigative journalism. The success of *The Washington Post* in its Watergate investigation has stimulated other newspapers to set up investigative squads. Increasingly it is the investigative reporter who receives the awards that journalists bestow upon themselves.

The Rise of the "New Journalism"

In this examination of professionalism and its relation to the press, it is relevant to note the development of what has been called "new journalism," a theory which asserts that the responsibility of the press is "to discover truth, not merely facts."[44] Other variations of this new type of journalism are

[41] Address by Walter Cronkite, Radio and Television Directors Association Conference, in Miami Beach, Florida, December 13, 1976.

[42] Fergus M. Bordewich, "Supermarketing the Newspaper," *Columbia Journalism Review*, September/October 1977, p. 30.

[43] Oakes, *supra* note 14.

[44] Paul H. Weaver, "The New Journalism and the Old – Thoughts After Watergate," *The Public Interest*, Spring 1974, p. 67.

"advocacy journalism" or "personal journalism."[45] In either variation, the reporter is encouraged to indicate and further its point of view in his news stories. Objectivity is ridiculed as being impossible to attain.

This has just meant that to an unprecedented extent, the media have not just reported events, but have stimulated, sometimes created, and even actively participated in those events.

It is here appropriate to quote a statement of Ben Bradlee, the pragmatic executive editor of *The Washington Post*, who said, "The press won in Watergate." Bradlee went on to make clear that he understood the implications of that declaration of victory by adding the caveat, "I believe, though, that power corrupts. We are in a powerful position and I hope we don't misuse it."[46]

It is understandable that a significant segment of the media has become impatient with its limited information dissemination role. It is not easy and frequently not exciting for an intelligent person simply to report events. The tendency, therefore, has been for imaginative and socially dedicated journalists to go beyond normal reporting in order to seek fuller expression of their talents or social values.

We must not forget, however, that these tendencies to develop a social, messianic role for the media, when added to the already feverish drive for the sensational story and the scoop, lead to further dispositions that should concern us.

Max Frankel, the editorial page editor of *The New York Times*, admitted the tendency of some journalists, especially the new recruits, to be impatient with standards of objectivity or with any standard that would prevent them from placing their own views before the public.[47] Asserting that "the new permissiveness is carried too far," Charles B. Seib, the ombudsman for *The Washington Post*, recently wrote that "It is a rare day that I don't see a news story that betrays a reporter's feelings in a way an editor of the old school would not have tolerated."[48]

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[45] *U.S. News & World Report*, August 2, 1976, p. 24.

[46] Confirmed in telephone conversation with Ben Bradlee, December 5, 1977.

[47] Confirmed in telephone conversation with Max Frankel, December 1, 1977.

[48] Charles B. Seib, "The New Reporters: Whistling Advocates,"

What are those views? Here we have some guidance in the form of the results of a Daniel Yankelovich survey which indicate that there is a serious gap in values between the bulk of journalists and society as a whole.[49]

Journalists are reported to have an instinctive suspicion and distrust of authority, particularly governmental authority. Frank Mankiewicz attributes a cynicism to political journalists, an assumption, for example, that no candidate ever advocates programs for reasons other than to get votes.[50] There are also troublesome signs of a homogeneity of political, social and economic attitudes. Theodore White described national journalists as a "self-selected group"[51] drawn from a social and educational elite affected by what Lionel Trilling termed the "adversary culture."[52]

Increasingly, journalists see it as their function to place before the public the needs of society as they see them. Roger Mudd of CBS stated this clearly, "What the national media, and mainly television, have done is to believe that their chief duty is to put before the nation its unfinished business. . . . The media have become the nation's critics, and as critics no political administration, regardless of how hard it tries, will satisfy them."[53]

This is an interesting development. Traditionally in our democracy, the nation's political agenda was the prerogative of the politician seeking and then elected to public office. Now the media are assuming that role. In addition to looking upon himself as a defender of people, the journalist now looks upon himself increasingly as a spokesman for the people; and yet, as the Daniel Yankelovich survey demonstrates, his values and the values of the society he would speak for are not the

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Washington Post, January 13, 1978, p. A13, col. 1.

[49] Confirmed in telephone conversation with James B. Lindheim, Senior Vice President, Yankelovich, Skelly and White, Inc., of New York City, New York, December 6, 1977.

[50] Henry Fairlie, "Press Against Politics," *The New Republic*, November 13, 1976, p. 14.

[51] Theodore H. White, "America's Two Cultures," *Columbia Journalism Review*, Winter 1969-70, p. 8.

[52] Lionel Trilling, *Beyond Culture* (New York: Viking Press, 1968). See Daniel P. Moynihan, "The Presidency and the Press," *Commentary*, March 1971, p. 43.

[53] Irving Kristol, "Crisis for Journalism: The Missing Elite," in G. Will, ed., *Press, Politics and Popular Government* (Washington, D.C.: American Enterprise for Public Policy Research, 1972) p. 50.

same.

The fact is that many reporters tend to think of themselves as representing the people in a disinterested way and with a purity of motive that a self-serving politician selfishly seeking votes cannot hope to duplicate. And yet, it is a strength of democracy that politicians are and should be aware of and responsive to voters. The English observer, Henry Fairlie, asserting that politicians "are the most hopeful messengers of a society's will to improve" and that "the political world is inherently good," complained that:

> Political journalists have been seduced into believing that politics is probably, if not necessarily, ignoble. . . . It is as if every journalist is afraid that he might be caught in believing in something or in somebody. Yet on the whole, the political world in the past 200 years has accomplished a great deal of good for a vast number of people.[54]

Analyses of Possible Media Bias

There is substantial evidence that television became a potent influence in turning public opinion against the Vietnam War. Edward J. Epstein early and conclusively demonstrated that the three television networks all began treating the war negatively after the Tet offensive.[55] Any doubts as to this effect were put to rest with the publication of Peter Braestrup's two-volume study on how the American press and television interpreted the Tet crisis.[56] The American media virtually single-handedly turned a significant victory for American and South Vietnamese troops into a demoralizing defeat, leading the tight-lipped Dean Rusk to ask some journalists, "There gets to be a point when the question is: Whose side are you on?"[57] Analyzing the Braestrup study, John P. Roche recently described this period as "a shameful episode in the annals of the American media."[58]

[54] Fairlie, *supra* note 50.

[55] Edward J. Epstein, *Between Fact and Fiction: The Problem of Journalism* (New York: Vintage Books, 1975) pp. 210-232.

[56] Peter Braestrup, *Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet-1968 in Vietnam and Washington* (Boulder, Colorado: Westview Press, 1977).

[57] Tom Wicker, *On Press* (New York: Viking Press, 1978) p. 11.

[58] John P. Roche, "New Book on Tet Offensive Shows Shameful Behavior of the Press," *Washington Star*, July 27, 1977, p. A15, col. 5.

Dr. Ernest W. Lefever, in his analysis of the CBS Evening News programs in 1972 and 1973, also produced very impressive data with respect to the media and national defense.[59] He found, for example, that stories on Vietnam that were critical of U.S. policy were aired 651 times in 1972, while stories that supported American policies were aired 153 times. On national defense generally, he found that major policy questions were "almost totally neglected." Nearly two-thirds of the stories that year presented the U.S. military in an unfavorable light, while in only 13 percent was it shown in a favorable light. Statements by newsmakers who were critical of official policies and wanted the U.S. either to get out or cut back in Vietnam were quoted 842 times in 1972, while those who wanted to see the war pursued more vigorously were quoted 23 times that year, a ratio of 36 to 1.

James Reston recognized that reality when he drew the following conclusion: "Maybe the historians will agree that the reporters and the cameras were decisive in the end. They brought the issue of the war to the people, before the Congress and the courts, and forced the withdrawal of American power from Vietnam."[60] And yet it is clear that Robert Bartley of *The Wall Street Journal* is correct in stating that the essence of "professionalism" is the setting aside of personal attitudes when writing stories or preparing a broadcast.[61]

"Selective Morality" in the Media

Personal opinion and bias, however, are not the only ingredients in news selectivity.

According to reliable sources, the death toll in Cambodia from beatings, shootings, starvation and forced labor has reached an estimated 1.8 million to 2.5 million victims since April 17, 1975, when the communists seized control.[62] This plight of the Cambodians has appeared regularly over the French news wire services, dating from the Khmer Rouge guerrillas' capturing of the country. The American daily press, however, until recently, largely ignored the modern-day holocaust in Cambodia. *The Wall Street Journal* suggested that the horrible crimes of the Cambodian communists had attracted less attention than much smaller crimes in other countries "because they are inflicted in the name of revolution," a view substantiated in part by Anthony Lewis' statement that the reports were met with skepticism because they came from "right-wing quarters."[63]

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[59] Ernest W. Lefever, *TV and National Defense: An Analysis of CBS News, 1972-73* (Boston, Virginia: Institute for American Strategy Press, 1974).

[60] James Reston, "The End of the Tunnel," *New York Times*, April 30, 1975, p. 41, col. 1.

[61] Robert L. Bartley, "The Press: Adversary, Surrogate Sovereign, or Both?" in G. Will, ed., *Press, Politics, and Popular Government* (Washington, D.C.: American Enterprise for Public Policy Research, 1972) p. 14.

[62] Jack Anderson, "In Cambodia, Obliterating a Culture," *Washington Post*, May 2, 1978, p. B12, col. 4.

Contrast this, however, with the news from South Africa, Israel, and Panama, now considered to be "hotspots." Every death in South Africa understandably brings with it thorough news and television coverage. Massacres and mass executions in many Third World countries have warranted only a few paragraphs, if anything, but rock-throwing incidents on the West Bank of Israel or a single regrettable killing in Bethlehem have evoked front page news stories and photographs. And, while the Senate debated the Canal treaties, the dozens of newspaper and television correspondents who had descended on Panama in anticipation of "trouble" if the treaties were not ratified, struggled "to find anything to report." The burning of the treaties in front of the United States Embassy, for example, became a major news event. "Sporadic demonstrations by leftist students," according to *The New York Times*, were "something of a godsend" to the reporters even when there were more journalists present than protesters.[64]

It is ironic that some of this overabundance of coverage is due to the fact that the press can be found only where it is permitted to be. It is difficult to cover the story of a slaughter in Cambodia or the training of terrorists in Libya where no American press is permitted.

Walter Laqueur's book, *Terrorism*, points out that the media act as a selective magnifying glass, enormously attracted to terrorism because of its mystery, quick action, tension and drama. The terrorists in turn depend on that publicity and media attention. As J. Bowyer Bell of Columbia University has pointed out, terrorism and media coverage exist in a symbiotic relationship. Television no longer just responds to a terrorist-event; it becomes an integral part of the event.[65] According to Laqueur, "The media, with their in-built tendency towards sensationalism, have always magnified terrorist exploits quite irrespective of their intrinsic importance. . . . All modern terrorist groups need publicity; the smaller they are, the more they depend on it, and this has, to a large extent, affected the choice of their targets."[66] The fact is the press and the terrorists feed on each other.

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[63] Reed Irvine, "Notes from the Editor's Cuff," *AIM Report*, Supplement, November 1, 1977; *AIM Report*, Part II, May 1978.

[64] Alan Riding, "Reporter's Notebook: In Panama, A Subdued Scene of Helplessness," *New York Times*, April 15, 1978, p. 9, col. 2.

As an example, Laqueur cites the Algerian rebels of the 1950s who deliberately transferred their struggle from the countryside to the capital, even though they knew they could not win the battle for the capital. One of their leaders is quoted as saying that if there were killings in the countryside, nobody would notice; but that a small incident in Algiers would draw the attention of the international press and give them the publicity they needed. This proved to be true. The rebels were beaten in the capital, but won what proved to be the decisive battle for publicity.[67]

The media role in terrorist threats is producing growing concern at home as well. The Son of Sam press coverage led the *New Yorker* to complain, "By transforming a killer into a celebrity, the press has not merely encouraged but perhaps driven him to strike again – and may have stirred others brooding madly over their grievances to act."[68]

Does the holding of a police captain in Ohio by one man justify banner headlines all over the country? Is our definition of "news" such that individual gunmen or bands of gunmen can command constant and dramatic national media attention? The news director of the CBS affiliate in Cleveland, Virgil Dominic, expressed this concern well when he stated after the fact, "We feel that the coverage we give such incidents is partly to blame, for we are glorifying lawbreakers, we are making heroes out of non-heroes. In effect, we are losing control over our news departments. We are being used."[69]

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[65] J. Bowyer Bell, "Terrorist Scripts and Live-Action Spectaculars," *Columbia Journalism Review*, May/June 1978, p. 48.

[66] Walter Laqueur, *Terrorism* (Boston: Little, Brown and Company, 1977) pp. 109-110.

[67] *Ibid.*, p. 109.

[68] *New Yorker*, August 15, 1977, p. 21.

The dean of The Annenberg School of Communications at the University of Pennsylvania, George Gerbner, is not at all sanguine that these concerns will produce change in behavior patterns of the media, because such stories, he says, "fit exactly into the media pattern" in that they are dramatic and provide good action-filled film. He states, "For the media it's a tremendous competitive situation, and as long as they can attract attention and ratings by covering these things, they will."[70] The question posed by A. M. Rosenthal, executive director of *The New York Times*, was "whether we are reporting these things or capitalizing on them."[71]

There are crucial questions concerning international and domestic policy that are crying for public information, discussion and knowledge. But again, it is easier and more rewarding for reporters to be assigned to cover the dramatic scoops and the scandals. Reporters on the diplomatic beat complain constantly that they have inadequate assistance and receive little attention except in cases of crisis.

Detente has been a dominant theme of American foreign policy in the past few years. Senator Fulbright, when he was Chairman of the Senate Foreign Relations Committee, complained that the press was uninterested in the extensive and thoughtful hearings on the subject held by his Committee. At one time, he implied that they had mistakenly held the hearings in the open. It would have been far better, he suggested, to have held the hearings in secrecy and then to have leaked the transcripts. In that way, they would have received generous press attention.[72]

The Presidential Campaign of 1976

Two years ago we were in the midst of a Presidential political campaign. The role of the media in candidate selection merits particular attention in an analysis of the media's power, responsibility and professionalism.

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69. Philip Revzin, "A Reporter Looks at Media Role in Terror Threats," *Wall Street Journal*, March 14, 1977, p. 16, col. 6.

70. *Ibid.*

71. Charles B. Seib, "Free Press, Fair Trial – In Theory, in Practice," *Washington Post*, August 19, 1977, p. A27, col. 1.

72. J. William Fulbright, "Fulbright on the Press," *Columbia Journalism Review*, November/December 1975, p. 42.

The Democratic Party, as part of its reform package, had eliminated the "winner-take-all" concept in state primary campaigns. It had opted for a system of proportionate division within each state, reasoning that the normal, narrow margins in single primary elections are only small indicators of popularity in a multi-contest process. But the media thought otherwise. Roger Mudd, on January 19, 1976, said on the CBS Evening News, "It's not exactly the precise figures that will be important, it's whether or not the media and the politicians agree that this man won and this man lost."[73]

Professor Thomas E. Patterson of Syracuse University, in a paper which he delivered to the American Political Science Association, analyzed the press coverage of the 1976 Presidential primaries and concluded that to the media "only the winner in a state seemed important. No matter how close the voting, the headlines and most of the coverage went to the winner, and he alone. . . . Moreover, the press showed little hesitancy in projecting the results of a single primary." The result was an exaggerated picture of a candidate's national standing, one that the press with its coverage had helped to create.[74]

In the first state to choose delegates, Carter secured 28 percent of the Iowa caucus vote on January 19, 1976. Mudd named him the "clear winner," asserting that "no amount of bad-mouthing by the others can lessen the importance of Jimmy Carter's finish."[75] It is interesting that in this period, the Gallup Poll showed Carter with only a 5 percent national standing, behind six other candidates.[76]

In New Hampshire, Carter was first past the post in the primary with 30 percent of the vote; 60 percent of the state's electorate had voted for one of the four more "liberal" candidates. But, according to Walter Cronkite, the results gave Carter "a commanding head start in the race" and Roger Mudd proclaimed that Carter's victory "was substantial."[77] NBC's

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73. Paul H. Weaver, "Captives of Melodrama," *New York Times Magazine*, August 29, 1976, p. 6.

74. Address by Thomas E. Patterson, "Press Coverage and Candidate Success in Presidential Primaries: The 1976 Democratic Race," 1977 Annual Meeting of the American Political Science Association, in Washington, D.C., September 1-4, 1977, p. 1.

75. Weaver, *supra* note 73.

76. Patterson, *supra* note 74, p. 4, n. 2.

77. Weaver, *supra* note 73, p. 51.

Tom Pettit called Carter "the man to beat"; *Newsweek* declared him the "unqualified winner." Not only did Carter's face appear on the covers of *Time* and *Newsweek*, but on the inside pages he received 2,630 lines of coverage, while Udall, the candidate in second place received 96 lines. All of Carter's opponents together received 300 lines. The week after the New Hampshire primary, Carter received three times the television evening news coverage of his major rivals and four times as much front page newspaper coverage.[78]

One week later, Senator Henry Jackson won the much larger Massachusetts primary with 23 percent of the vote. Paul H. Weaver, writing in *The New York Times Magazine*, pointed out that reporters did not like Jackson and that television therefore dismissed his victories as special cases. Whereas Carter's win in New Hampshire was considered a "substantial victory," giving him "a commanding head start," Jackson's vote in a state seven times as large was looked upon only as "a strong finish" that "scrambled the race." Carter's 23,000 votes merited a great deal of respectful talk about this momentum; Jackson's 163,000 votes elicited little more than surprise.[79]

When Jackson went on to win in New York (the second largest state), Roger Mudd said that his winning coalition was "peculiar to New York" and Leslie Stahl of CBS News declared that his victory did not give him momentum.[80] In absolute terms, television news coverage of the New York primary was only 25 percent of that of New Hampshire. Each New Hampshire vote received 170 times the amount of coverage given a New York vote.[81] It very well may be the case, as Professor Michael J. Robinson of Catholic University concludes, that Senator Jackson was the candidate chiefly "victimized" by the media coverage in 1976: in those six early primary states where Jackson had been a contestant, he had actually beaten Carter by over 300,000 votes.[82]

Professor Patterson's study showed that during the early

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[78] Patterson, *supra* note 74, p. 6.

[79] [illegible] note 73, p. [illegible]

[81] [illegible] Robinson, "Television and American Politics 1956-[illegible]," *The Public Interest*, Summer 1977, p. 17.

[82] Michael J. Robinson, "TV's Newest Program: The 'Presidential Nominations Game,' " *Public Opinion*, May/June 1978, p. 43.

Democratic primaries, "Carter simply dominated the election reporting. In the critical period between the New Hampshire and Pennsylvania primaries he received 43 percent of the network evening news time given the Democratic contenders, 59 percent of the space in *Time* and *Newsweek*, and 46 percent of the newspaper coverage." Jackson and Udall, on the other hand, each received less than 20 percent of this newspaper and television coverage and even less of the magazine coverage. "Moreover," the study continued, "Carter's coverage was more prominent than the others. He was the candidate who was most often in the opening lines of lead stories, the one who got most of the headlines, the one who was pictured and filmed the most."[83] In the week following the January 19 Iowa caucus, *Time* and *Newsweek* devoted 726 lines to Carter's candidacy, while the other candidates were granted 30 lines apiece. Carter was the subject of special coverage on the TV news programs, receiving, according to Professor Patterson's analysis, "about five times as much exposure as each of his major rivals. As for the newspapers, Carter received an estimated four times the column inches of his typical opponent."[84]

Presidential primaries attract attention, particularly the one in New Hampshire. In fact, Professor Robinson has formulated what he terms the "dismal" theory that "the key to winning the nomination is merely to be *declared* the winner by the networks in the New Hampshire primary."[85] It is often "forgotten," for instance that President Johnson received a majority of the votes in the 1968 New Hampshire primary, but Eugene McCarthy was "declared" the real winner by the press. Robinson points out that before the 1976 New Hampshire primary, 11 states held caucuses or conventions and that these states accounted for a total of 587 delegates compared to New Hampshire's 38. Yet, the news stories on those 11 states represented less than 10 percent of the total networks' political news stories compared to 23 percent for New Hampshire alone. Delegate for delegate, that is, New Hampshire received more than 80 times as much coverage as those early non-primary states.[86]

83. Patterson, *supra* note 74., pp. 3-4.
84. *Ibid.*, p. 5.
85. Robinson, *supra* note 82, p. 42.
86. Weaver, *supra* note 73, p. 51.

In the three months before the New Hampshire primary, according to Patterson, 54 percent of the campaign news on television and 34 percent of the campaign stories in newspapers were entirely or mostly about New Hampshire. By comparison, the Massachusetts primary, which followed New Hampshire's by a week and in which six times as many delegates were at stake, was the topic of only one in ten news stories.[87] Yet, New Hampshire contributed only 17 of the 3,008 delegates to the Convention, approximately one in every 175.[88]

From all of this media concentration, concludes Patterson, "most people came to know only one of the candidates – Carter."[89] Public recognition of Carter quadrupled.[90] That this proved helpful to Carter is indisputable. The influence of the media in the 1976 nomination process was clear and may well have been decisive.

The Presidential Campaign of 1968

The death of Senator Hubert H. Humphrey and the extensive media attention to it recalls the Presidential campaign of 1968 and the crucial role played by the media, which, in the opinion, of many, may have tilted that close election toward Richard Nixon.

The Chicago convention of the Democratic Party and the manner in which it was reported portrayed a party that was unfit to govern and unable to cope with its own internal violence and disruption. *Baltimore Sun* Washington columnist, Ernest B. Furgurson, summarized the views of many observers when he wrote that television made Humphrey's nomination "seem worthless" with its "out of balance" reporting. "Television," he wrote, "came to Chicago in a bad mood" as a result of Lyndon Johnson's refusal to accommodate the networks by holding the convention in Miami Beach, the Republican site, which would have saved them millions of dollars. In Chicago, they were harassed by a telephone strike and by Mayor Daley's refusal to exempt their broadcasting trailers from parking regulations around the major hotels.[91]

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[87] Patterson, *supra* note 74, p. 5, n. 4.

[88] *Ibid.*, p. 6.

[89] *Ibid.*, p. 7.

[90] *Ibid.*, p. 9.

[91] Ernest B. Furgurson, "Anniversary of Chicago," *Baltimore Sun*,

There was violence in Chicago. There was also, however, violence in Miami Beach during the Republican Convention. In Chicago, sniper fire was reported; there were no deaths; and no curfew was imposed. In Miami, six persons were killed and the riot area was put under curfew. Drew Pearson and Jack Anderson, who had earlier reported in their column that the networks intended to retaliate against the Democrats by focusing attention on "disturbances" at the convention, reported that:

> The networks got their revenge. In Chicago they played up the violence which they had virtually ignored in Miami . . . anyone who watched the two conventions on television might think that Chicago was exploding with violence while Miami was comparatively peaceful. The result was an outrageously biased picture of the events in Chicago.[92]

The networks' presentation of a picture of violence which virtually ignored the fact that the demonstrations had been planned by agitators from all over the country seeking to foment trouble and attract attention through blatant provocations was enhanced further on the second day of the convention after a CBS correspondent, Dan Rather, was punched by a convention security officer. In describing this event, Theodore H. White, in his *The Making of the President – 1968*, writes, "The television networks will avenge him by spending their wrath on every security agent, every policeman, from now to the end of the convention."[93] Furgurson called it "a vindictive near-hysteria on the air" which not only affected the commentators, but also "swept through the off-camera producers and directors who began broadcasting tape as fast as it was received, making it seem that the violence in the streets was simultaneous with the nomination process in the hall – indeed, somehow, that Humphrey was being nominated by the force of police clubs."[94]

Thus, as White reports, when Carl Stokes, the Negro mayor of Cleveland, was about to second Humphrey's nomination at 9:55 P.M., the NBC film of the earlier street bloodshed was

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August 28, 1969, p. A18, col. 7.

[92] Drew Pearson and Jack Anderson, "Networks Slanted Chicago Coverage," *Washington Post*, September 6, 1968, p. B13, col. 5.

[93] Theodore H. White, *The Making of the President – 1968* (New York: Atheneum Publishers, 1969) p. 285.

[94] Furgurson, *supra* note 91.

aired and "Stokes' dark face is being wiped from the nation's view to show blood – Hubert Humphrey being nominated in a sea of blood."[95]

Writing from personal observation, Pearson and Anderson suggested that the television cameras helped incite the violence. They "found almost no action outside the circle of the TV klieg lights." The networks, they concluded, in an effort to make news, "encouraged dissidents to make inflammatory statements and helped to stir up controversies."[96]

Humphrey was identified by the media with Daley and the police, and, therefore, as "evil" in Furgurson's perception. Network reporters looked for a political alternative and stimulated the creation of a Ted Kennedy for President boomlet, but "long after disorganized conversation among the politicians involved had faded."[97] Describing this effort of the network reporters, White says, "If the script that night had called for the discovery and dissemination of a Southern revolt or the candidacy of Lester Maddox, the reporters could have dramatized that to the nation, too – all carved out of truth, from the lips of authentic and honest men on the floor."[98] Reporters proved themselves quite adept at finding delegates to mouth that which they wanted conveyed to the television audience, thus presenting a distorted view of sentiment on the convention floor.

The criticism of the television coverage of the 1968 Democratic National Convention was so strong and overwhelming that the House of Representatives Committee on Interstate and Foreign Commerce ordered a staff investigation and then published a report which, in the main, supported the criticism.[99] It presented specific evidence of distorted film editing, lack of balance, emphasis on violence, deliberate selection of unflattering camera angles in photographing Humphrey, and overall news slanting.

In early January 1969, before Richard Nixon's inauguration

[95] White, *supra* note 93, p. 302.

[96] Pearson & Anderson, *supra* note 92.

[97] Furgurson, *supra* note 91.

[98] White, *supra* note 93, p. 282, n. 6.

[99] Staff of Special Subcommittee on Investigations of House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., *Television Coverage of the Democratic National Convention, Chicago, Illinois 1968*, Committee Print, 1969.

as President, a world-famous network correspondent visited Vice President Humphrey in his White House office and tearfully apologized: "We defeated you, Hubert" was the confession.

At that time another friend commented that the press was so hostile to the Vice President that if he had walked across the Potomac, the headline would read "Hubert Cannot Swim."

Falling Confidence in the Media

It has been said that the media have been acquiring an unwholesome fascination with the singer to the neglect of the song, placing an excess of emphasis on personalities and not enough on policy.[100] The crucial ingredient for gaining press attention seems to be violence and scandal, whether it is corporate, political or personal. As in the days of "yellow journalism," news programs appear to move from one disaster to another: air crashes, earthquakes, floods, sex. In a speech to the Associated Press, then outgoing president, Wes Gallagher warned, "Too many readers are beginning to look upon the press as a multivoiced shrew, nitpicking through the debris of government decisions for scandals but not solutions."[101] Expressing growing concern, *The Wall Street Journal*'s able investigative reporter, Jerry Landauer, warned that as scandals have come to "dominate the news," competitive pressures will be apt to "overshadow fair play, resulting in overstated coverage" until a new "scandal" emerges.[102]

When contrasted with daily newspapers, the sensationalism of television journalism may well be more evident and thus more serious. Since seeing journalists, rather than just reading their stories, makes them appear more credible as well as more familiar, their influence is that much greater. Professor Michael J. Robinson was led to conclude that "the networks produce an image of society that tends to be both melodramatic and probably inordinately negative."[103]

The cumulative effect of these shortcomings is a diminishing of public confidence in journalism and that, in itself, is a danger to democracy. The Harris Poll reports that confidence in television news fell from 35 percent in 1975 to 28 percent in both 1976 and 1977; confidence in the press fell from 26 percent in 1975 to 20 percent in 1976 and to 18 percent in 1977.[104] A nationwide survey conducted through the University of Texas found that 84.4 percent of those responding believed that journalists sometimes slant the news. Indeed, 71.6 percent of the journalists reached the same conclusion.[105]

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[100] Fulbright, *supra* note 72, p. 41-42.

[101] *U.S. News & World Report*, August 2, 1976, p. 22.

[102] Jerry Landauer, "The Press and 'Koreagate,' " *Wall Street Journal*, October 6, 1977, p. 20, col. 3.

[103] Robinson, *supra* note 81, p. 28.

A. H. Raskin, an editor of *The New York Times*, once said:

> No week passes without someone prominent in politics, industry, labor or civic affairs complaining to me, always in virtually identical terms: "Whenever I read a story about something in which I really know what is going on, I'm astonished at how little of what is important gets into the papers – and how often even that little is wrong."[106]

As has often been observed, there are two Americas – the America you see on your television screen and the America you see when you walk out of your front door.

James Reston recently stated, "The credit of the American newspapers with the American people for accuracy and judgment is not high."[107] It has, of course, from the beginning of our history, never been high with political figures; Spiro Agnew's hyperbole was not unique. Lyndon Johnson's press secretary, Bill Moyers, provided this report of a Cabinet meeting, "The President was much inflamed, got into one of those passions when he cannot command himself, ran on much on the personal abuse which has been bestowed on him, defied any man on earth to produce one single act of his since he had been in the government which was not done on the purest motives . . ."[108] Mr. Moyers was not referring to President Lyndon Johnson, but was quoting Secretary of State Thomas Jefferson describing President George Washington.

At the end of his second term in office, Harry Truman wrote to a friend, "I really look with commiseration over the great body of my fellow citizens, who, reading newspapers, live and die in the belief that they have known something of what has been passing in the world in their time."[109]

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[104] Louis Harris, *Confidence Climbing* (The Harris Survey Press Release of March 14, 1977).

[105] *U.S. News & World Report*, April 29, 1974, p. 33.

[106] A. H. Raskin, "What's Wrong with American Newspapers?" *New York Times Magazine*, June 11, 1967, p. 77.

[107] Confirmed in telephone conversation with James Reston December 6, 1977.

[108] B. Adler, ed., *The Washington Wits* (New York, Macmillan Publishing Company, Inc., 1967) p. 195.

On the same theme, Theodore Sorenson, after returning to private life, wrote, "In the White House I felt sorry for those who had to make judgments on the basis of daily newspapers."[110]

Is Self-Regulation Possible?

Whether the media can face up to legitimate criticism is not clear. Raskin himself has expressed doubts on this question, considering "the unshatterable smugness" of the publishers and editors.[111] Lester Markel went further, alleging that "the press, pretending to believe that there is no credibility gap and asserting its near-infallibility, countenances no effective supervision of its operation; it has adopted a holier-than-thou attitude, citing the First Amendment and in addition the Ten Commandments and other less holy scripture."[112]

Constitutional protections of the press are today an integral part of the maintenance of our society. The dangers of government regulation of the press are clear. Inescapably, however, the power of the press presents a clear problem to our democracy.

Indeed, two Justices of the United States Supreme Court have publicly reached disparate interpretations of how the First Amendment affects the press, an intellectual disagreement that promises to send substantial constitutional ripples when ultimately faced and resolved by the entire Court. In a speech at the Yale Law School in 1974, Associate Justice Potter Stewart expressed his view that the free-press guarantee of the Constitution deliberately extends special protection to the publishing business which he claims is "the only organized private business that is given explicit Constitutional protection." Freedom of the press, he argued, means that the press was specially designated in the Constitution to be autonomous of the Government, so that it may provide "organized, expert scrutiny of government." As such, it requires special protections to preserve its independence.[113]

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[109] Kristol, *supra* note 10, p. 49. Also quoted in Moynihan, *supra* note 52, p. 41.

[110] Raskin, *supra* note 106, p. 28.

[111] *Ibid.*

[112] Lester Markel, "Watching the Press," *New York Times*, February 2, 1975, p. 31, col. 5.

Chief Justice Warren E. Burger, in dictum of his concurring opinion in a recent unrelated case, stated a contrary position. The Chief Justice took issue with the idea that the "institutional press" has any freedom beyond or different from that of the public generally. He asserted that there is simply no historical basis for distinguishing the press in this context. "In short," he concluded, "the First Amendment does not 'belong' to any definable category of persons or entities; it belongs to all who exercise its freedom." [114] Such an attitude may very well, if manifested in Court decisions, represent a significant restraint on the power of the press.

An important lesson of history is that self-regulation is the best defense against undesirable control by the government. Walter B. Wriston, Ghairman of Citicorp and a leader familiar with power, once said of the press, "History teaches that when any sector of our society grows too powerful, it is only a matter of time before that power is curbed."[115] Significantly, Ralph Nader recently released a 90-page manual designed to facilitate citizen groups in their undertaking of extensive studies of their local newspapers in an effort to make them "more accountable to the people they serve."[116] I question whether the Nader approach will prove sufficient for the task, but it may well be a preview of more intensive "consumer movement" attention to the press.

It is time for the press to come up with an initiative of its own to help solve the problems created by its great and growing power. At the present time, the media fall short of professional standards. Professions provide procedures and standards for qualifying and disqualifying their practitioners. Lawyers, doctors and all other professionals must reach a level of training and learning before they are admitted. There are no formal standards for admission to the field of journalism.

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[113] Floyd Abrams, "Two Theories of Press Freedom Are Parallel, Yet Bound to Meet," *New York Times*, May 7, 1978, p. E11, col. 1. For a related pronouncement on how the press should be afforded special treatment in the context of Fourth Amendment searches and seizures, see *Zurcher v. The Stanford Daily*, 46 U.S.L.W., May 31, 1978, pp. 4546, 4552-54, U.S., Nos. 76-1484, 76-1600 (Stewart, J., concurring).

[114] *First National Bank of Boston v. Bellotti*, 46 U.S.L.W., April 25, 1978, pp. 4371, 4379-81, U.S., No. 76-1172 (concurring opinion); Seib, *supra* note 21.

[115] *U.S. News & World Report*, August 2, 1976, p. 23.

[116] Larry Kramer, "Nader Urges Public to Monitor Press," *Washington Post*, April 10, 1978, p. D10, col. 1.

Although Sigma Delta Phi (the society of professional journalists) has devised an ideal (but non-binding) code of ethics, there is no universally-accepted standard of professional ethics to guide and judge the behavior of newsmen or their editors. There is no procedure, external or internal, to condemn those who do not live up to a pattern of responsible conduct. Stockbrokers who sell securities and even real estate salesmen must first pass an examination to qualify and can be barred from selling their wares to the public in cases of fraud or failure to disclose pertinent data. But a newsman and his editor can inflict with relative impunity greater damage to our society by selling wares that pollute the well of information. Examinations, qualifications, standards, and "disbarments" may or may not be appropriate measures to help journalism establish professional standards for itself, but clearly, in striving for more professionalism in journalism, additional measures of self-correction are required. When the Twentieth Century Fund, on the advice of some leading figures in American journalism and based on the success of the British example, established a Press Council, such leading papers as *The New York Times* and *The Washington Post* refused to cooperate with that council.[117] Indeed, the American Society of Newspaper Editors a few years ago voted by three to one against the establishment of even its own internal grievance committee.[118]

An independent press council is necessary to consider and resolve disputes arising out of alleged unfair press treatment.

Major newspapers and television stations should invest their own independent ombudsmen, who are not members of their staffs, with authority to act to redress valid complaints. In a recent exchange, Hugh Sidey of *Time* reported that his magazine has never allowed a correction to run in its news columns. He suggested the possibility that major errors could and should be corrected in the same space, giving them the same manner of treatment.[119] Sidey makes an important point, because the manner of presenting the correction is just as important as the presence of the correction itself. Charles B. Seib, a worthy prototype in his role of ombudsman for *The Washington Post*, confirms that view with his observations: "Newspaper corrections traditionally are cryptic and often grudging. The non-correcting correction . . . is not unusual. . . . The problem is that we do not devote a small amount of the enterprise and zeal we show in news-gathering to cleaning up the messes we make. . . . There is a journalistic truth. . . . The correction never catches up with the mistake."[120]

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[117] G. Giancardo, ed., *Problems of Journalism* (Easton, Pennsylvania American Society of Newspaper Editors, 1973) p. 264.

[118] *Ibid*., p. 265.

[119] H. Purvis, ed., *The Presidency and the Press* (University of Texa

A code of ethics is needed that addresses itself to the problem of personal bias on the part of news writers and editors.

Some Legislative Alternatives

Legislation is needed that will minimize the inequitable protection now afforded the press in libel litigation and permit public figures to sue for declaratory judgments when they are defamed, even if little or no money for damages is paid. England's democracy has been able to flourish within its legal system of strict libel laws and its other rigid rules on reporting.

It is time to consider seriously antitrust measures to contain the substantial horizontal and vertical growth of communications conglomerates, such as common ownership of book publishing, newspapers, magazines, broadcasting, and paper products. The media as a market are just as subject to monopolistic and anticompetitive practices as is the market for conventional goods and services. While the promises of the First Amendment are essential to our democracy, we must not forget that, in the words of Justice Hugo Black, "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[121] The circle of public disseminators of information is not enlarging; instead, each day brings yet another indication that a relatively concentrated core of communications

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at Austin: Lyndon B. Johnson School of Public Affairs, 1976) pp. 84-[illegible].

[120] Charles B. Seib, "The Case of the Outrageous Headline," *Washington Post*, April 15, 1978, p. A11, col. 1.

[121] *Associated Press v. United States*, 326 U.S., 1945, pp. 1 and 20.

companies are controlling even more sources of our information.

To address this problem, four legislative initiatives should be given serious consideration. A few years ago, Senator Thomas J. McIntyre proposed a bill which would limit the number of newspapers a company can own and prohibit newspaper ownership of television or radio stations in the same metropolitan area.[122] In April 1977, Congressman Morris Udall introduced legislation that would include publishing and communications in the subject matter of a proposed federal commission to look into industrial concentration, saying, "I dread the day when all American newspapers look alike, and read alike, and where there won't be much more difference in the daily papers in Topeka and New York than there is in . . . a Big Mac."[123] In April 1978, Congressman Udall, with 71 other sponsors, introduced another bill which would provide tax incentives to local newspapers so as to protect them from being acquired by chains.[124] Most recently, Congressmen Lionel Van Deerlin and Louis Frey introduced on June 7, 1978, a bill that would overhaul federal communications law by, among other methods, limiting the television networks and other owners of broadcast stations to a maximum of five television and five radio stations, although such ceilings would apply only when present owners sold or transferred properties.[125]

The Justice Department and the Federal Communications Commission have suggested or undertaken significant investigations into the possibility of divestiture of network owned-and-operated stations, reductions in the amount of programming networks are allowed to produce in-house, and other measures intended to limit network control over local stations and programming.[126] Further, just recently the Justice Department filed a civil antitrust lawsuit under Section 7 of the Clayton Act against CBS, Inc., asking that it divest itself of Fawcett Publications, Inc. It is also reported that the Federal Trade Commission is looking into the effects of last year's acquisition of the Book-of-the-Month Club by Time, Inc., as well as the proposed merger of Harper & Row Publishers, Inc., with J. B. Lippencott Company.[127] Finally, on June 12, 1978, a unanimous Supreme Court upheld in their entirety regulations issued by the Federal Communications Commission in 1975 to the effect that newspapers can no longer acquire radio or television stations in the same community. Although allowing most existing combinations of newspaper and broadcasting outlets to continue, the Court did require divestiture in 16 "egregious cases" in which, in relatively small communities, the combination included the sole daily newspaper and the sole clear-signal television or radio station.[128]

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[122] S. 3305, 91st Cong., 2d Sess., 1970.

[123] H. R. 6098, 95th Cong., 1st Sess., 1977; Kevin Phillips, "Busting the Media Trusts," *Harper's*, July 1977, p. 34.

[124] H. R. 12395, 95th Cong., 2d Sess., 1978; *Washington Post*, May 9, 1978, p. D8, col. 2.

[125] H. R. 13915, 95th Cong., 2d Sess., 1978; *Wall Street Journal*, June 8, 1978, p. 2, col. 2.

[126] Phillips, *supra* note 123, p. 32.

The tasks required to deal adequately with increasing concentration of power in the press are not simple. A serious professional effort may well require a self-reformation that could take on the characteristics of a self-revolution. The recruitment and training of editors, reporters and the like would require change. News stories would have to be written less hastily. They would probably be longer and in greater depth, possibly at the risk of not being as lively.

The challenge for the media is to come up with their own standards of professionalism and to adapt those standards to the realities of their responsibilities in a free society. There is no further room for complacency and arrogance. In short, the industry must heed the directive of one of its most eminent members, John B. Oakes, when he recently declared, "We of the press have to take much firmer steps than we have taken not only to improve quality and upgrade content but to make ourselves voluntarily more accountable as well as more accessible to the public."[129]

In summation, our country requires a political theory to suit its new role as a world power. We have had a perilously short apprenticeship to shouldering the burdens of that power. We are unfamiliar and morally uncomfortable with our new position. This makes defense policy, foreign commitments and intelligence gathering serious issues to be discussed, debated and understood.

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[127] *Washington Post*, June 2, 1978, p. B8, col. 6.

[128] *National Citizens Committee for Broadcasting v. Federal Communications Commission*, 46 U.S.L.W., June 12, 1978, p. 4609, U.S., Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685; Morton Mintz, "Press-Broadcast Merging Barred by High Court," *Washington Post*, June 13, 1978, p. A1, col. 6.

[129] Oakes, *supra* note 14.

The traditional American political philosophy based on 19th century liberal rationalism is now undergoing serious challenge and reexamination. We need a working political philosophy that will help us to deal effectively with the problems of power. The concept of power has been altered in the modern world by the revolutionary developments in technology and communication.

The intricate relationships that have always existed between freedom and authority are more complex now than they ever have been. It is difficult, but not impossible, for believers in democracy to adapt to the rapidly changing realities of modern technology.

Whether or not our institutions of society and government can work to help us mature to a responsible world power committed to democratic values is what is at stake in this year and in the years to come. The power of the media as it affects and reflects our national interests must be seen within that perspective.

STATEMENT BY JAMES K. BATTEN, GROUP VICE PRESIDENT/NEWS, KNIGHT-RIDDER NEWSPAPERS, MIAMI, FLA.*

As a Washington correspondent in the 1960s, I spent many fascinating days in Senate hearing rooms, but I must confess I never expected to be back in the role of witness. Nonetheless, I appreciate your invitation, and I am glad to help the committee explore some of the issues under discussion here.

You ought to know, by way of background, that my career has been spent basically as a reporter and editor, and that my present corporate responsibilities with Knight-Ridder continue to focus primarily on our news and editorial operations. I am less intimately involved, in a day-to-day way, with the business and financial affairs of our company.

My role, in a way, reflects the long-established separation of the editorial and business functions in our company. We are a business, to be sure, but a business with a difference. We are in business to make a profit, but we also have, in our free society, enormously important public service obligations. The dichotomy in our mission is reflected in our structural arrangements. We think it is vital that our editors be given a large measure of autonomy not only from corporate headquarters in Miami, but from their newspapers' local business-side management.

Within our profession—or industry, if you like—I think it is fair to say that Knight-Ridder is known as a company which traditionally has placed very high priority on editorial excellence. That tradition goes back to John S. Knight, who, with his brother Jim, built our company. Jack Knight, who held most of the titles at one time or another, likes to say that there is no higher title than editor. He won a Pultizer Prize for his personal column, "An Editor's Notebook," which he wrote for many years. Lee Hills, who recently stepped down as chairman of the board after a distinguished career which led from a variety of editorial chairs to the chief executive's post, won a Pultizer for his own deadline reporting.

So our company has been shaped to an unusual degree by practicing journalists of considerable distinction. And this generation of leadership, under Alvah H. Chapman, Jr., our president and chief executive officer, is deeply committed to the notion that Knight-Ridder in the 1980s will be second to none in journalistic excellence and service to our readers and our communities. We are serious people, and we have no intention of failing to meet that test.

This committee's interest, as I understand it, is in the growth of large newspaper groups. We are, unquestionably, one of those groups. Knight-Ridder owns 32 daily newspapers, ranging in size from big metropolitan dailies like The Philadelphia Inquirer, The Miami Herald and the Detroit Free Press down to small-city papers like the Aberdeen American News in South Dakota and the Boca Raton News in Florida.

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*James K. Batten. Statement by James K. Batten, Group Vice President of Knight-Ridder Newspapers, to Select Committee on Small Business, United States Senate, holding hearings on economic concentration in the newspaper industry. May 25, 1979. Reprinted with permission of James K. Batten of the Knight-Ridder Newspapers, One Herald Plaza, Miami, Fla. 33101.

Our daily circulation is around 3.5 million, which by that yardstick makes us the largest in the United States. We have nearly 16,000 full-time employes. Our revenues last year were around $880 million.

So we are big; there is no question about that. The question, I suppose, is whether bigness *per se* is bad in newspaper publishing, as some critics tend to assume. It will come as no shock to you that my answer is an emphatic no.

I'd like to elaborate on the reasons why in just a minute. But first, I want to make it clear that I do not regard myself as an apologist for the group-newspaper phenomenon. While there are a number of groups which, like Knignt-Ridder, are committed to editorial quality, there are others which are not committed to that ideal. I think such publishers, whether they publish dozens of newspapers or only one, are failing in their First Amendment obligations. They do a grave disservice to us all.

In personal terms, I must confess there is a side to me which would prefer an idyllic world full of truly excellent, ruggedly independent, locally owned newspapers. But that, of course, is a world that never was, despite the critics' nostalgia.

There is no question that a fair number of American cities a generation or two ago were blessed with such newspapers—devoted to their communities, fearless in their integrity, sufficiently strong in economic terms to do a first-rate job for their readers.

But, sadly, that was never the dominant pattern. Large numbers of newspapers in this country were simply not very good, to put it gently. In some cases the deficits were in resources; there just wasn't enough money to do a first-class job. In other cases there was an appalling shortage of professionalism. And for still others, the problem was unwillingness to stand up to self-serving special interests. In many cases, all three problems were present—and inevitably reinforced each other.

I think the crucial fact that needs to be understood in this debate over group newspapering is that quality and public service are not at all functions of the *size* of a newspaper's owner, or of how many newspapers the company owns. They depend, instead, on the intentions, capabilities and performance of the owners.

There are excellent newspapers owned by groups and excellent newspaper owned by local independents. And conversely, there are mediocre newspapers published by groups and mediocre newspapers published by local independent owners.

In the case of Knight-Ridder, our size and resources help us assure quality. Our reputation for improving newspapers is well known. Let me give you only a couple of many possible examples:

Under Knight-Ridder ownership, which commenced in 1969, the Philadelphia Inquirer has moved from mediocrity to distinction. There has been a massive effort to improve every part of the newspaper, and it has been remarkably successful. A few weeks ago, the Inquirer won its fifth Pulitzer Prize in five years, an almost unprecedented record in American newspapering. Beyond the Pulitzers, the Inquirer has won more national journalism prizes over the last five years than any other newspaper in the United States. Prizes are not the only index of excellence—and not the most important one—but they do tend to reflect the tangible benefits a newspaper brings to its readers and to its community.

Another example, in a smaller city:

The Lexington Herald and the Lexington Leader, in the bluegrass country of Kentucky, became Knight-Ridder papers in 1973. Since that time, the news staff has increased by 50 per cent. There are 20 per cent more columns of news and 30 per cent more local stories. We added full-color printing, Washington Bureau coverage, increased State capital coverage, Parade magazine on Sundays, a weekly television magazine, a sharp increase in letters to the editor, and on and on.

Another way we use our resources to serve readers better is through steps that enrich the material available to all our newspapers. In the last five years, for example, we have added six reporters and editors to our Washington Bureau. Today, it is unquestionably among the best bureaus in this city.

At our annual shareholders' meeting last month, Alvah Chapman, our president and CEO, announced that in the next two years Knight-Ridder will be substantially increasing our foreign coverage. For many years, top reporters both from the Washington Bureau and from individual papers have traveled and reported from abroad. We have had good results from that approach. For example, the Philadelphia Inquirer's Richard Ben Cramer won this year's Pulitzer Prize for international reporting with his brilliant and sometimes dangerous work in the Middle East. And the Miami Herald has regularly produced first-class coverage of Latin America since the 1940s.

In discussions over the last year, however, we have concluded that we should provide more systematic foreign coverage for our readers. A number of U.S. news organizations have been retrenching in their foreign coverage in recent years. But we believe that foreign news, if anything, is even more important these days. Readers of the San Jose Mercury and News who are waiting in long gas lines understand that part of their frustration is traceable to events in Teheran.

So within the next 24 months, our plan is to open eight foreign bureaus in strategically located cities around the world. That will be an expensive project, but we think it's going to be good for our papers and good for our readers. We think it is in line with our obligations.

It is reasonable to ask why Knight-Ridder puts such high priority on improving its newspapers. There are two interlocking reasons. One is that the people who run our company believe there is a moral obligation to publish the best newspapers we know how. The press has very special responsibilities in our democratic system, and we take them seriously.

The other reason is that we believe good newspapers are good business—and that in the years ahead, stagnant, hold-the-line newspapering is not likely to succeed particularly well. One of the reasons is that the competition for people's time and attention is growing steadily more intense. Newspapers which fail to change and improve, in my opinion, are likely to see severe erosion of their place in readers' lives.

Let me take just a minute to underscore the intensity of the competition faced by newspapers. In Charlotte, for example, the largest city in Senator Morgan's state, Knight-Ridder owns the two daily newspapers—The Charlotte Observer and The Charlotte News. But in addition, Charlotte has two VHF and three UHF television stations, plus 16 radio stations and a twice-weekly community newspaper. And in the surrounding surrounding counties of the Piedmont Carolinas where The Observer has roughly half its circulation and has been the morning newspaper for many years, there are a large number of steadily improving afternoon newspapers which serve their communities well and are giving The Observer strong competition. Any newspaper which rests on its laurels in that sort of dynamic competitive environment is going to have trouble.

A more subtle form of competition for newspapers is the proliferation of specialized print media: books and magazines on very narrow subjects addressed to small but intensely interested audiences. If the amount of time and money people spend on information media of all kinds remains constant over time, as suggested by Professor Max McCombs of Syracuse University, then these publications represent another very important kind of competition for all newspapers.

Finally, let me address a question that understandably concerns a number of critics of large newspaper groups. That is the danger of excessive centralized power over the dissemination of news and commentary in this country.

The first point to be made is that the day of the press lord in America is long gone. Anybody who tried to use a group of newspapers these days to propagate the owner's political or policy views wouldn't get very far. Today's readers are simply too sophisticated and skeptical to swallow such a thing.

In the newspaper groups that have grown up since World War II, the strong trend has been toward local autonomy in news and editorial decision-making. Significant departures from that pattern are so unusual—as in the case involving the Panax newspapers a year or so ago—that they make news and attract a great deal of flak, which is healthy.

In our company—and most others I am familiar with—nobody at the top dictates what goes into a local newspaper. The corporate role basically is to pick good people to edit our newspapers and then do everything we can to help them do their best work.

Newspapers by their very nature belong, in a real sense, to the communities they serve—and newspaper editing is an intensely local process. There is no other way to do it right. Any groupowned newspaper which carries a branch-office flavor will be distrusted and resented. And it should be.

There are, of course, no sure guarantees that we will have no bad newspaper groups, just as there are no sure guarantees under the First Amendment that society will never have to endure a bad or irresponsible individually owned newspaper. The Founding Fathers set out to protect free expression, not to assure the quality of that expression.

In a speech at the Yale Law School in 1974, Mr. Justice Stewart pointed out that publishing is "the only organized private business that is given explicit constitutional protection." In our constitutional scheme, the press is specially designated to be independent of, and not beholden to, the government.

American newspapers today are fallible and human institutions. They make mistakes. Sometimes they are unfair, and occasionally even irresponsible. But overall, in my view, the press today is more principled and professional than at any time in our history—and is widely acknowledged as the best in the world. For all our blemishes, we are serving our country and our citizens vigorously and well. And newspapers owned by groups are a large part of that story.

A Fairness Doctrine Debate*

Mr. **Proxmire.** Mr. President, on November 26 I inserted in the Record part of a debate on the Federal Communications Commission's fairness doctrine. I will ask that the entire debate be printed in the Record.

The debate was before the 50th anniversary convention of the National Association of Educational Broadcasters in Las Vegas on November 20.

The principals in the debate were Richard Jencks, vice president of CBS/Washington; and Robert Lewis Shayon, author, critic and professor at the Annenberg School of Communications, University of Pennsylvania.

Henry Geller, formerly of the FCC staff and now with the Rand Corp., commented afterward on the debate.

In the spirit of fairness, Mr. President, I ask unanimous consent that the debate and Mr. Geller's "afterword" be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

A Fairness Doctrine Debate

Mr. **Jencks.** Thank you very much. Does the Fairness Doctrine violate the first amendment? Of course it does. And the Supreme Court will so decide when an appropriate case comes before it. The argument made by the defenders of the doctrine is simple, and on the face of its disarmingly appealing.

It is that the Fairness Doctrine enhances the First Amendment by assuring the public's right to know. If this argument is correct, a First Amendment applied to the nation's print media should be constitutional. Indeed, that very argument was forcefully made before the U.S. Supreme Court in the Miami Herald case in which a Florida statute providing a right of reply was at issue. The statute was analogous to the FCC's personal attack rules which form a part of the Fairness Doctrine. But the Court last June rejected the enhancement argument and unanimously held the Florida statute to be unconstitutional. Speaking for a unanimous court, Chief Justice Burger declared, "The choice of material to go into a newspaper and the decisions made as to limitations on the size of the newspaper and content and treatment of public issues and public officials, whether fair or unfair, constitutes the exercise of editorial control and judgment.

It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press as they have evolved to this time. If then, government compelled fairness would not enhance the first amendment as to the print media, how then can it enhance the first amendment as applied to the broadcast media?

The fact of the matter is that the case for a government guarantee of fairness is even poorer with respect to the broadcast press than with respect to the print press. Item: the consequence of violating the right of reply statute held unconstitutional in the Miami Herald case was only to be convicted of a misdemeanor. It involves no government power to shut the newspaper down.

In contrast, a broadcaster who flouted the FCC's doctrine could, and would, as in the case of station WXUR, lose its license and be utterly shut down. Item: the opportunity of the Miami Herald to impede the free flow of information to the public through unfairness is far greater than that of any broadcaster. As Chief Justice Burger observed, "One newspaper towns have become the rule, with effective competition working in only 4% of our large cities. By contrast, in 92 of the top 100 television markets, there are 3 or more television stations. Television and radio stations are nearly 5 times as numerous as daily newspapers." Item: Miami Herald can comply with government-compelled fairness far more easily than could any broadcaster. The cost of preparing and inserting printed material into a newspaper is low, and a newspaper format is expandable.

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*Richard Jencks and Robert Lewis Shayon. A Fairness Doctrine debate before the National Association of Educational Broadcasters, Las Vegas, Nevada, November 20, 1974, after comment by Henry Geller, in Congressional Record. Washington, U.S. Government Printing Office, 1974, Dec. 16, 1974: S 4007–40012.

By contrast, the cost of producing visual material, as this audience well knows, is high, and a broadcast schedule cannot be expanded. Nothing can be added without something else being dropped.

In short, the burden on broadcasters of compelled fairness and therefore its chilling effect on first amendment rights, is not less, but is far greater than the burden of enforcing fairness upon newspapers. Yet, television and radio are at present the American public's primary source of news and information. It is not merely losing a fairness doctrine case which demonstrates the crippling impact of the fairness doctrine.

For a broadcaster to undertake the burden of defending against an FCC fairness complaint, even though he ultimately prevails, just as clearly kills first amendment rights. Two examples may suffice. In June of 1970, following several presidential primetime broadcasts, CBS initiated what it contemplated was to be a periodic series entitled "The Loyal Opposition," featuring leaders of the party out of power.

After the first broadcast, featuring Democratic national committee chairman Larry O'Brien, the Republican national committee filed a fairness complaint. The FCC upheld the complaint, and ordered us to provide free time to the Republicans. CBS appealed.

Fourteen months and thousands of dollars of legal expenses later the court of appeals reversed the FCC and vindicated CBS. But the FCC in court decisions so clouded the area in which our license discretion might be upheld, the project was abandoned. Indeed, it might be asked what gain the Republican party would have achieved from the victory after 14 months had elapsed.

The court, as editor in chief of a journalistic organization, is simply ineffectual. Another landmark case, of course, this time with a two year delay between complaint and final judgment involved the NBC 1972 pensions documentary, "Pensions, the Broken Promise." The second class citizenship of broadcasters also creates opportunities for burdensome harassment by the Congress, as well as by the FCC and the courts.

Because of their FCC oversight responsibility, the Senate and House commerce committees often have conducted investigations and hearings on fairness charges such as was done with the CBS News documentaries "The Selling of the Pentagon" and "Hunger in America" among others.

Newspaper executives do not troop resignedly up to Capitol Hill to explain and justify their stories and features. Can anyone think that it promotes fearless journalism for broadcasters to have to do so?

If the impact of the fd on powerful and affluent organizations, like CBS, cannot be calculated, its impact on te small broadcaster cannot help but be shattering. Lawyers' fees for handling the smallest fairness complaint—and there were 2800 fairness complaints in 1972—are rarely less than 300 to 500 dollars.

Henry Geller, former general counsel for the commission, in his recent study of the fairness doctrine and broadcasting, reports that a fairness complaint over an editorial carried by a Spokane, Wash., station, a relatively innocuous editorial urging support of a bond issue to finance Expo 74 resulted in legal expenses alone of about $20,000, plus travel expenses and some 480-man hours of executive and supervisory time. This, mind you, was a complaint that didn't even reach the commission itself, let alone the courts.

After twenty-one months of proceedings, the FCC staff found that the station had offered a reasonable opportunity for reply to the editorial. But as Mr. Geller writes, because of editorials such as that on Expo 74, the renewal of a station's license can be put in question, and for a substantial period.

What effect, perhaps even unconscious, does this have on the manager or news director, next time he is considering an editorial campaign on some contested local issue. What effect does it have on other stations?

A short answer to Mr. Geller's rhetorical question is that the effect of such proceedings on the station involved and on other stations is to unconstitutionally inhibit freedom of expression and the dissemination of ideas.

Although Henry Geller is himself probably the most knowledgeable advocate of the fd, his scholarly study indicates that he obviously reads CBS vs. Democratic National Committee case as casting grave doubts on the constitutionality of the fd as it has been administered since 1962.

Mr. Geller points out that the court in that case rejected the idea of a constitutional right of access because that would have involved the FCC far too much in what the court referred to as the "day-to-day editorial decisions of broadcast licensees." Clearly, writes Mr. Geller, if that is true as to a right of access by persons to broadcast facilities for editorial advertisements, it is also true as to the application of the fairness doctrine.

So, to save the fd, Mr. G. recommends that the FCC return to its pre-1962 fairness practice, but with the major difference that the commission would make no attempt whatsoever to rule on individual complaints, but rather would determine at renewal time whether there had been such a pattern of conduct throughout the license period as to indicate malice or recklessness with regard to fairness obligations.

Now presumably this debate this noon concerns the fairness doctrine as the FCC now administers it. And even Henry Geller would not, if I read him correctly, support the argument that the doctrine as presently administered is constitutional.

There are others, however, who do not believe that even the refinements suggested by Mr. Geller would save the doctrine from being struck down by the courts. Senator Proxmire was once so devoted to the fd that it was at his suggestion in 1959 that it was elevated from mere FCC policy and made a part of the communications act.

The Senator recently announced that he now plans the introduction of a bill to eliminate the doctrine from the statute books. "The heart of my position," Sen. Proxmire says, "is that the fd is an appalling adman's name for justifying depriving radio and television of their first amendment rights." Senator Ervin, often called the leading constitutionalist of the Senate, has written of the fairness doctrine, "at its best it stifles controversy; at its worst, it silences it; in its present condition, it represents a fickle affront to the first amendment."

They are not alone. Chief Judge David Bazelon of the U.S. Court of Appeals of the District of Columbia, a judge with a record of consistent support over the years for aggressive regulation of the broadcast media is also in the number. Characterizing the FCC's revocation of WXUR's license as a prima facie violation of the First Amendment, the judge said, "It is proper that this court urge the commission to draw back and consider whether time and technology have so eroded the necessity of governmental imposition of fairness obligations that the doctrine has come to defeat its purpose." His language recalls a pressing statement by the Supreme Court in its 1969 decision in the red line case.

That is the case with its sweeping dicta about the public's right to know on which the defenders of the doctrine must rely. The court said in red line, "If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the quality of coverage, there will be time enough to reconsider the constitutional considerations. That time has surely come.

The nation's tragic experience with Watergate, if nothing else, must have the effect of forcing thoughtful people to reexamine the idea that we should entrust government with enforcing the flow of information under the 1st amendment.

What do the defenders of day-to-day government interference with the broadcast press have to say about all this? All they are left with is the iteration and reiteration of hackneyed slogans and outworn ideas. One of those is that the airwaves belong to the people. That may be true enough as far as it goes.

But the whole lesson of American democracy is that we do not secure the rights of the people by vesting those rights in their government. Isn't it clear that American newspapers and magazines belong to the people in a truer and more significant sense than the press of any country where it is subject to government contract? They argue that there is a technical scarcity of broadcast frequencies, and in a highly technical sense, that's true enough.

But that does not demand that we choose between applicants for such frequencies on the basis of their conformance with the government's ideas about how news and information should be reported. In closing, I would remind you that those who call most persistently and eloquently for an ending of the fairness doctrine experiment are not in the main broadcasters themselves. The exercise of unchanneled first amendment rights is not necessarily profitable.

The unhappy fact of the matter is that most broadcasters have been content to be tame tabby cats on this issue, reasonably happy with their regulated status, relatively undisturbed by a regulatory regimen which encourages blandness and inhibits robust debate. When the FCC 3 years ago sent a questionnaire to broadcasters soliciting suggestions as to the deregulation of radio it obtained from 7,000 radio broadcasters only 424 replies, and these mainly relating to trivia.

Indeed, the passivity of most broadcasters on this issue is itself a damning indictment of the long-term effect of the governmental regulation of the broadcast press.

I would close by reminding you of the words of Justice Douglas, no apologist for broadcasting, in his concurring opinion in CBS vs. Democratic National Committee. Said the Justice, "The Fairness Doctrine has no place in our first amendment regime. It puts the head of the camel inside the tent, and enables administration after administration to toy with tv or radio in order to serve its sordid or benevolent ends. What kind of first amendment," he went on, "would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned first amendment that we have is the court's only guideline, and one hard and fast principle which it announces is that government shall keep its hands off the press.

That means, as I view it, that TV and radio, as well as the more conventional methods of disseminating news are all included in the concept of the press as used in the first amendment. Ladies and gentlemen, I trust and believe that when the issue framed by this debate squarely reaches the Supreme Court, Mr. Justice Douglas' brethren will agree with him. Thank you. (applause)

Mr. SHAYON. I was going to congratulate NAEB on its 50th anniversary, but I see that Jim Fellows is holding a tight clock, so I'll make it a very quick congratulation.

Dick Jencks as a good broadcaster got off right on the nose, and that places a burden on me. I want to make it right clear at the start that I am not an unqualified defender of the fairness doctrine as it is.

It has its faults, in fact much of public discussion about it has to do with suggestions for improving it, even for trading it for other measures that will protect fairness for the public. I'm prepared to talk about them if we get into them, but just now I'm saying no to the clear proposal that the fairness doctrine violates the constitution. That's the area we're constrained to discuss and I'm sticking to it.

In a debate, when the pros and the cons don't know what each other is going to say, there's a lot of overlapping, and of course, Dick anticipated some of my comments, and I anticipated some of his. But at the risk of redundancy, I'm going to formulate a line of reasoning which gives you a picture of the fairness doctrine as the negative sees it rather than the affirmative. Then we'll get into a trading of arguments later on.

The answer to the question is of course no because the Supreme Court has said no. It said no, as Dick suggested, in Red Lion, the case which challenged the constitutional and statutory bases of the doctrine and its component rules. It even said no in CBS v. DNC. Indeed, it's curious to know that in that very case, CBS relied on the fairness doctrine to reject a right of paid access. Again the U.S. Court of Appeals said no in the pensions case which Dick mentioned.

It said that the licensee did not make an unreasonable judgment in implementing the fairness doctrine, but had a wide degree of discretion in the handling of news documentaries. But the court in no way suggested abandoning the fairness doctrine. Whenever it's been at issue, the courts have by a majority sustained the fairness doctrine in broadcasting as a necessary control for the public interest. The broadcaster can not assert a right to freedom of the press that transcends the public's right to know.

To be sure there are dissenters. A good friend the liberal Justice Douglas is a first amendment hard-liner. Justice Stewart joined him in his dissent in CBS vs. DNC. And chief justice Bazelon of the court of appeals has had doubts about the fairness doctrine. But Justice Saterday, if you read your New York Times, you'd see that the good judge is wavering.

He made a speech at the FCC Bar Association in which he expressed his doubts about the industry's performance in the public interest. In an outspoken attack on television not equaled since Newton Minow's wasteland speech he said that the industry was making it difficult for judges and lawyers to ensure that traditional guarantees of freedom of the press continue to be applied to television. So you've got Bazelon wavering between the two extremes.

Nevertheless, as Chief Justice Hughes once said, we live under a constitution, but the constitution is what the judges say it is. As of now, the Supreme Court has said eight to nothing in Red Lion that the fairness doctrine is constitutional, and they said it again in CBS vs. DNC, 7 to 2. Of course, the Supreme Court has reversed itself in the past. Classic majority dissents have lived to see the day when they became majority opinions.

Dick Jencks may be the John Marshall Harland, the great dissenter of the 19th century. He may be doing us a great public service by hammering away at the minority view. I could stand on what the lawyers call *stare decisis* of the court and say "It is settled," but that wouldn't be any fun. So let's go into the thicket of the constitutionality of the fairness doctrine and have another round.

I take it Jencks, representing many broadcaster licensees, wants to join the heavenly company of the print publishers, who are exempt from the regulatory powers of government, although of course, they are beneficiaries of salutary government intervention in their business, by virtue of enjoying favorable postal rates.

Publishers don't mind the camel's nose in the tent when it helps them to make a profit. The broadcasters want the same rights that the print media enjoy. Should they have it? Justice Holmes once said, "The life of the law has not been logic; it has been experience." Nevertheless, let's try logic. Let's not have a debate; let's pursue truth.

And again quoting Justice Holmes, "All I mean by truth is what I can't help thinking." The purpose of the first amendment, as our moderator said, was to keep government from prior censorship of the press so that ideas could flourish freely in the marketplace, robust, vigorous, clashing, antagonistic. Out of this would emerge the wisest decisions for a democracy. That was the faith. Only if the fairness doctrine in broadcasting under it, only political candidates and persons specifically attacked on the air have clear, unqualified rights to speak.

As for the rest of us, in determining whose rights are paramount under the first amendment the courts have said that it is the right of the people to be informed that is paramount, not the broadcasters' rights, not the viewers' nor the listeners' nor even the one who wants to speak his mind in public forums. It's the right of all of us to have spread before us a diversity of opinion. On that, as Judge Learned Hand said, "We have staked our all." OK, diversity of opinion and an informed electorate, on that the broadcaster and the regulator agree.

The position of the regulators is that it's not unconstitutional for the government to use the first amendment affirmatively to ensure diversity of opinion. You know the arguments, scarcity of frequencies, the public trustee concept, the recipient must give the people something in return when he gets a franchise. At the very least, an obligation to conduct informed public dicussion on matters of concern, and when conducting them, to be fair to all shades of opinion. The broadcasters is given the widest possible latitude in exercising this public trustee function.

This is the constitutionally approved scheme for broadcasting. It's different from the print media where the publisher has an unabridgeable right to be unregulated. The broadcaster may even refrain from raising any controversial issues and still escape sanctions. This happens, as you know, many years when stations fail to broadcast even the barest of news and public affairs and get their licenses renewed.

The fairness doctrine, is hardly perfect in its implications and implemntations. It has many derogators on right and left, but it is the bedrock of the public interest standard of the communications act. Take it away, and you have no act. The position of the broadcasters who urge the abandonment of the doctrine is that it invades the first amendment rights of the broadcasters.

Mr. Vincent Vasilefski, president of the NAB in a fairness doctrine hearing in 1968 before a House Subcommittee argued that even if the government grants the broadcaster a franchise with exclusive use of a frequency the government may demand nothing in return without violating that broadcaster's first amendment rights. The argument further runs that most broadcasters will, by necessity and just plain natural virtue, for fair without regulation. Go peddle your ideas to another station, to a newspaper, make a speech, write a book. You ought to not to have a direct legal remedy.

There should be no way in which a broadcaster can be chastised for failure to give someone else the right of reply to anything the broadcasters say on the air. This doesn't mean, say the broadcasters, that the listener is left with no remedy at all. There is a—remedy What is it? Listen to Mr. John J. Koporra, Vice President for news for Metromedia at the House Hearings in 1968: quote "There's a very orderly procedure for taking care of the bad broadcaster in the capitalistic system. That is, he will go broke, and be forced to sell.

A bad broadcaster will not survive," end quote. In short, the broadcaster should get his franchise and have no obligation to be fair other than his own sense of decency. That's how we get diversity of opinion, and serve the needs of a democratic society for informed discussion. To do otherwise, to insist that the broadcaster to be legally required to be fair would be to harass, to inhibit him, to chill him, rather than risk legal sanctions, he will engage in no controversy, and all his broadcasts will be bland, and there will be no diversity of public opinion.

What should one reply to this position? At the worst, it seems to me that it is unconscionable that one man should say to the people of the United States, "Give me a piece of everybody's electromagnetic spectrum and I will operate it for my own partisan purposes and profit and keep everyone I don't agree with off the air." But let's suspend judgment and try it out. Let's see how it would actually happen.

Many of you are familiar with the famous WLBT–TC case in Jackson, Mississippi. The licensee was LaMAr Life Insurance Co. and all through the late 50's and 60's it was asserted by citizens of Jackson, Miss. that the station was guilty of racial and religious discrimination. It cut off network civil rights broadcasts with signs reading "Sorry, cable trouble."

Eventually with no help from the FCC, the Office of Communication of the United Church of Christ persuaded the U.S. Court of Appeals to grant a hearing, and when the evidence was all in some five or six years later, the court itself vacated the license of LaMAr Life. It said that the FCC's record in the case was irreparable, and it took the license revocation sanction into its own hands. Now suppose we eliminate the fairness doctrine.

A licensee operates one of two vees in Jackson. It decides to put on racist editorials. You don't think that can still happen? Go down to Jackson. What's to stop him? Does a black citizen rush to the competitive station and beg time for a reply and possibly be refused? To the newspapers and get turned down? Perhaps they wouldn't turn him down, but they could, couldn't they? And he'd have no legal remedy, none at all.

I ask Dick Jencks, do you really believe that such a system would serve our need for an informed public opinion, for fairness in the clash of ideas, presumably the lifeblood of our democracy? If you ever got the Congress to abandon the fairness doctrine, and broadcaster mavericks act up the way WLBT did, there would be such a public cry of outrage that the next fairness doctrine written into law would have the kind of teeth the present one lacks, and I don't think the broadcasters would care for that bite at all.

They want the same first amendment rights as the print media. What that means is that they want a monopoly based on scarctiy of frequencies, and they want it free and clear of any legal obligation to be fair in public discussion. I'm not prepared to let them have it on those terms. You wish to be free of obligations? Then I'll free you also of your monopoly position.

No obligations, no monopoly. Turn pay cable lose. Let's have a real competitive market based on open entry, and we'll discuss it. But they're trying to stop pay cable. They don't want an open entry. They want a protected market and on top of that they want no legal obligations for fairness. Trust us, they say, we'll be fair because we love fairness. And if there are a few bad apples, the system will take care of them. Now, come on. Ok, there are other solutions.

Let's rewrite the act. Let's auction off the frequencies to the highest bidders. Give it to the winners, free and clear of any fairness doctrine restraints, but on condition that they set aside 10% of prime time for public access and that they give—you're gonna love this—10% of their gross revenues to public broadcasting.

Then you can have your unharassed, uninhibited first amendment. You want that Dick? If you have no fairness obligations, why should you be allowed as CBS to own 5 VH stations in the top market? Why not just one? The so-called chilling effect of the fairness doctrine is legendary, despite the protestations of professional journalists, our scholarly expert Henry Geller says that they've never even been documented.

Everyone knows the fairness doctrine is really a mild regulation. Broadcasters have lived with it and maintained their profits. What the broadcasters are really worried about is access. That's what they're concerned about. People are not content to let Cronkite and Reasoner, Chancellor speak for them and say every night that's the way the world is. Is it? People want counter-rags. There will be more court challenges. Dick, in 1969, at a panel of the American Bar Association, you accepted Red Lion as the farthest permissible reach of government.

The figures show that the networks in only one case, the famous NBC–Chet Huntley case, where he broadcast an editorial favoring cattle raisers when he had an interest, a conflict of interest, was the only time the networks ever got hooked. In the NBC case, the courts overturned the FCC. Figures. In 1971, there were 2000 fairness doctrine complaints. In only 168 cases did the FCC send inquiries to the stations, an 8% ratio of inquiries to complaints.

There were only 69 FCC rulings, and only 5 out of 2000 were adverse to licensees. Even in 1972, Dick, in Aspen, Colorado, you still found that the fairness doctrine has worked fairly well. You relied on it in CBS vs. DNC. Judge Tamm of the U.S. Court of Appeals dissenting in the NBC pension case said, "The fairness doctrine as it has been utilized here is the yeast of fairness in the dough of the telecaster's right to exercise his journalistic freedom."

Nobody asked the broadcaster to be a public trustee. He volunteered for the license. He volunteered for it, and he did it with his eyes wide open to what the terms of the game were: a right to make a mint of money in return for fairness to the public in controversial issues, a balancing of his rights against the people's rights under the first amendment.

If CBS or any other licensee doesn't like the way the game is played, let them turn in their license and resign. There are plenty of others waiting on the sidelines with very eager appetities to get into the game under the exceptionally mild and generous conditions of the constitutional fairness doctrine.

Mr. JENCKS. Well, I'll try to deal with some of the matters that Bob Shayon raised. He says that the Supreme Court has firmly decided that the Fairness doctrine is constitutional, which I don't think is the case, and the real test will be the S. C. gets a case in which a license hangs in the balance, such as the Brandywine case which did not go to the Supreme Court.

Judge Boyelan was among others who do not think that Red Lion is dispositive as to the legality of the fairness doctrine. And it's very curious indeed that last June in the Miami Herald case, although striking down the right of reply statute directly analogous to the right of reply regulation which it had upheld five years before, the Supreme Court of the United States did not even mention Red Lion, did not attempt to distinguish it, did not attempt to justify it.

Now, Bob says that I'm asking you to rely upon the decency of broadcasters. I'm not, anymore than I ask you in the print field to rely on the decency of publishers. Rather, I'm asking you to rely upon their contentiousness and their desire to reach their readers, if they are running media general circulation. He says the bedrock of the communications act is the fairness doctrine, take it away and you have no act.

Well, you had no fairness doctrine from the inception of the act in 1934 until 1949, and you had no fairness doctrine embodied in the statute until 1959. So, clearly you can have a communications act and proper regulation of broadcasters and no fairness doctrine. He talks about commercial broadcasters desiring to strangle pay television, and if that's the case, there are laws suitable to cope with that. The anti-trust laws for one.

Justice Douglas made clear in his opinion from which I previously quoted, and I quote again, "The commission has a duty to encourage a multitude of voices but only in a limited way, viz. by preventing monopolistic practices and by promoting technological developments that will open up new channels. He got quite a laugh from you in talking about the possibility that he would be willing to auction off our firt amendment rights if we would be willing to give 10% of our profits to public broadcasting.

If he would really be willing to abandon his precepts for a price, then I think we have gauged his depth of feeling about the first amendment. He asks me the rhetorical question can I really believe, he says, can I really believe the system of untrammeled freedom would serve our needs? And I ask you back, can you really believe that the press of this country, the print press, serves our needs?

And if it doesn't, why not? Look about you, when you read your morning newspaper, whether it be the Las Vegas Sun or the New York Times, or the Los Angeles Times, or the Washington Star-News, or the Washington Post, when you read your news magazine whether it be U.S. News and World Report or Time or Newsweek, do you yearn to have the power to make a federal commission make that publication do its will? Do you yearn to have the licenses of those publications terminated? Do you yearn to have a federal court in Washington decide when their articles and features had been fair and unfair?

And more to the point, do you yearn to have those editor-in-chief's decisions come one year, two years, three years after the controversy which precipitated them? Does that strike you as improving the press upon which you depend every day of your life?

If it does not, then the humorous solutions and the decency of broadcasters are really beside the point. Broadcasters are no more decent, nor any less, than newspaper publishers. (Side 2 of tape.) Stations as superb as any of the best of the print media in this country. The question is what is the risk of allowing that freedom to happen? I don't have any more time, So I * * *

Mr. SHAYON. Well, as to the constitutionality of the fairness doctrine, I would welcome a test confronting the issue head on. Dick is right. The courts have hedged very often in confronting the issue squarely, even in the WXUR decision, Brandywine, the argument was that the decision was based—the revocation of the license—on what the majority opinion called "a very narrow ledge."

The judges are very sensitive to getting into a confrontation of the issue, and I for one would like to see a case come before the court where it met it head on, but as of the present moment, the best indications we have is that whenever faced by the Supreme Court in a tangential situation, they seem on the whole to have upheld the necessity for the fairness doctrine.

Now, Dick says that there was no fairness doctrine until 1959–69. Now I disagree with that. If you read the history of the Federal Radio Commission, you will see that in its initial rulings, they specifically and explicitly set forth the principle of fairness to all shades of opinion. Very quickly the politicians got into the act and got section 315 written for them in fairness.

It took a little while longer for everybody else to get their bit into the act, but the concept of fairness was inherent in the regulatory scheme this country's broadcasting licensing system from the very beginning on, and if Dick would like we could go to the records and we can check it out. He talks about the press serving the needs. Well, I for one happen to believe that the press in many respects did not serve the need of the people.

I happen to agree with Jerome Barren that I'd like to see an experiment made in the right of access for reply to newspaper space—it's much easier for the newspaper to add pages than it is for a broadcaster to add time, that's true. But I don't think that the present system adequately meets the demands of the 20th century for all the people to get into the act of diversity of opinion. Barren is right.

The romantic conception of the first amendment that was in view when the founders of our republic framed the Constitution is no longer adequate to the needs of the 20th century. We have different means of communication, massive means of communication, which take a lot of money, as our moderator says, and the ordinary citizen just can't get into that game, so we have a real realistic notion of the marketplace of ideas, and it presents new problems.

I don't say that the fairness doctrine as is is the answer, but I say, it's the final bastion we have under the present system for the legal protection of the citizens' rights, and I'm not prepared to forego it and take the risk of trusting either the wisdom, or the decency or the fairness of broadcasters to implement the first amendment rights. Let's talk for a minute about this chilling of the press. It's argued that it arises as a result of the economic and procedural and time burden imposed upon broadcasters.

I have a different theory about the chilling effect. It comes from the economic structure of the industry. The industry is foremost committed to entertainment, so it says to its people in news and public affairs. "Here's a little corner of the total spectrum. You operate that little corner, and don't you dare get out of it." So the Cronkites and the Reasoners, naturally they're human like all of us, they say. "That's my little corner. That's my territory. I'm in charge of it, so I'm going to be the judge of what goes in and what goes out, and I'm going to be the public voice, and I'm going to be the trustee."

But they resist attempts of anybody else to take a little piece of their precious corner and play with it, and I say that's not adequate to represent the rights of all citizens today. There's a clamoring, a hunger for public discussion by spokesmen who want to initiate controversies that the public media do not even recognize as controversy. How are we to deal with that problem?

There are suggestions for improving the fairness doctrine, for trading perhaps for free speech messages. I would be in favor of an experimental situation to see whether or not it would really provide a solution to fairness doctrine's defects, but I'm not prepared to scrap the fairness doctrine until I see whether or not this system proves out.

What I'm arguing is that broadcasting is still not the print media, the public still needs protection in the area of limited frequencies, and that the fairness doctrine line should be held until something better can be demonstrated.

Question from floor.

Dick, isn't it true, apropos right from the beginning, that when Secretary of Commerce Hoover, later the President of the United States, as the Secretary of Commerce, he considered broadcasting a public property and from the inception proposed that those be a reservation of time, something between 20 and 25% of all the broadcast time, morning, afternoon, and evening, shall be reserved, not for sale, but for public use—(interrupted by moderator for second question—second question summarized in Shayon's opening remarks.)

Mr. SHAYON. Let me take the smaller question first. The philosophical basis for a discussion of the fairness doctrine and man's place in the universe—that's easy. Well, a serious question deserves a serious answer, and I conceive of man to be what I call a dialectical creature. He's capable of using his mind, he's capable of growing, he's being exercised. It's the opposite of what has come to be known as the banking concept of information and education, where you conceive of individuals as banks into which you deposit wisdom, and when necessary you submit a deposit slip and you call it back. Unfortunately, most of our public education is banking education.

But I think public broadcasting has a tremendous opportunity to be a dialectical system of education in which we won't tell people what the answers are but we engage with them in a discussion and we listen to them and we learn from them and together we engage in a growing dialectical experience. This is my view of a man, as a philosophically creative creature rather than a passive one. Ok, that takes care of the easy one.

Now let's take the hard one. The hard one is: what are we going to do with this fairness doctrine? It has its defects, some people say it doesn't work for me, others say it works too much, everybody's complaining about it. Well, I think there is no mechanical solution to the problem. X amount of broadcast time reserved for the public or for free speech messages, well, I'm willing to try that, but again, man is not a mechanical creature. You don't get a mechanical solution to a creative problem.

The only real problem—the only real solution to this problem—is a real, spiritually dedicated, affirmative commitment of all broadcasters, commercial and public, to a reasoned discussion of controversial issues in the interest of an informed public opinion.

And I say, that means that they've got to go out and not only provide public forums under duress but to help the people think their way through to a clarification of the complex issues of our complex world. It isn't enough for a broadcaster to say "Here's an access program—20% of my time. Anybody that wants to come on can have a point of view and say it and that takes care of the problem of discussion in a democracy." It doesn't. The broadcasters are professionals; in that respect, Dick Jencks is right.

As professionals they should serve the people, and they should serve the people by engaging in some kind of a dialectical situation with them. They should come to us and say, "What are you trying to say? Let us help you say it. Let us use our resources to help you organize your views, and let us see that everybody has this opportunity."

A mechanical attribution if you get 2% and you get 3% and balancing it—that's never gonna solve it. The judges and the lawyers want mechanical statistical solutions—that's how they work, that's how their universe structures. They have to have unqualified laws to which they can appeal in all their wisdom. But life isn't like that.

There are no mechanical solutions to our problems. And if only the commercial broadcasters would really say "Look we're all in this human boat together. Profit is not the end of it.

The survival of our planet, of our race, of our values is involved—which has a higher priority—speech in the interest of discussion of ideas to have our democratic institutions, or speech for the peddling of commercial products, however important they are to our economy?

If only they would say that, and commit themselves to an affirmative use of their resources for public controversy, we wouldn't have any fairness doctrine complaints or problems. I've been in the broadcasting business. I organized the first CBS documentary unit, which was the first network to deal with controversial issues.

I dedicated my life to the handling of public issues over the media, and I tell you, it can be done. It can be done without fuss, without feathers, it takes a risk, it takes guts, and there is no security from problems. But if you really want to do it, you can persuade the people of this country that the broadcasters are fair in their handling of public controversy.

We're not asking for legal remedies, we're asking for remedies that come from the heart. And I think ultimately, this is what fairness is all about. Not fairness that is sanctioned and constrained by the law, but fairness that comes from the heart. That's the fairness that for 30 years I've been begging the commercial broadcasters to exhibit, and now may I add, I beg the public broadcasters to exhibit. Thank you.

Mr. JENCKS. Well, to devote myself to the queston, isn't it true that President Hoover said that broadcast frequencies are public property and that broadcasters should be required to give 20–25% of their time for public uses. Yes, it is true that President Hoover said that.

There were occasions, on which you recall, President Hoover was wrong. He was partly right in that remark. He was not right—Hoover was one of our Presidents who was not a lawyer—and he was certainly not right in meaning to suggest that because the air waves are public property that restraints can be placed on the first amendment rights of those who use the property.

I think there that Judge Bazelon was correct when he said that government cannot place restraints upon the first amendment rights of the users of this property simply by declaring "I own it." Now as to the philosophical basis of our democracy, and of communications generally, I take it that it finds its reflection in the Constitution, in the proposition that this is a government of reserved powers. Powers that are not granted to the government are reserved for the states and the people. And I think that means that we trust people.

The American experiment was intended to take government off the backs of people. The framers of our Constitution could, of course, have decided upon a system under which the press would be licensed. That was the precedent they knew. That was what George III and his predecessors had done. They decided, and they didn't much like the press, which then as now is quarrelsome and difficult and arrogant, they decided they'd take their chances with it.

They thought that government control of the press would prove to be stupid, irrational, and suppressive of free speech, and they were right. 315, the equal time provision, is a good example of a stupid, irrational provision, almost everybody so recognizes now, and only the politicians don't have the courage to admit that mistake. Stupid also, is the idea of a federal commission, or a federal judge sitting in judgment on a network documentary two years after the documentary was broadcast.

There comes throughout much of this discussion the idea that if we don't like commercial broadcasters, then withholding their freedoms from them is some sort of punitive act. We say, "We're going to treat you this way until you show that you deserve better treatment." And I say that is at odds with the philosophical basis of this nation and the genius of its people. It's very much at odds with it. We've seen in the past two years the free press operate in a way which is really one of the glories of our history.

There has never been a time in the whole nearly 200 years of this country, in which the press has performed so valuable a role. So far as broadcasters are concerned, and CBS in particular, that, I'm afraid has been, not because of, but in spite of the government power over the broadcast media. CBS, as you know, was No. 1 on President Nixon's list of enemies. And there were a number of efforts made to deal with CBS, and some as you know with Katherine Graham of the Washington Post. Those didn't succeed. We don't want to see any efforts like that succeed in the near future.

So I would say to you that the experiment that we want to make is to return to the experiment that we've all been embarked upon for 200 years, which is the experiment in the First Amendment, the most extraordinary experiment that has been utilized with respect to communications in any nation in the world, and it's worked, despite some of our dissatisfaction with the print media, we know it has worked there, and I think it would work with the broadcast media, and I hope that as broadcasters, you will join the task of seeing to it that you insist upon First Amendment rights and that broadcasters as a whole have them and have them without having to bargain for them, have them without let and hindrance, have them just as the rest of the press has them, Thank you.

AFTERWORD: LOOKING BACK AT THE DEBATE

(By Henry Geller)

My first comment is to commend the excellence of the debate on both sides. Exception could be taken to a few supporting points, but the essential contentions were, I believe, well and forcefully presented. The debate covered two main issues: (1) Is the fairness doctrine constitutional under existing law; and (2) should it be constitutional; does it serve the public interest, including the crucial First Amendment goal of promoting robust, wide-open debate?

1. *Constitutionality*. Dick Jencks stresses the recent Miami Herald holding of the Supreme Court:

"The choice of material to go into a newpaper, and the decisions made as to limitations on the size of the newspaper, and content, and *treatment of public issues and public officials—whether fair or unfair*—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." [Emphasis added]

The Florida "right of reply" statute there struck down is, he correctly points out, analogous to the FCC's personal attack/political editorializing rules. Indeed, if anything, it is harder to make the fairness case in the broadcast field because although "a newspaper format is expendable . . . a broadcast schedule cannot be expanded; nothing can be added without something else being dropped" (Jencks, pp. 3–4).

On the other side, Bob Shayon also marshalls a powerful case: The Supreme Court found the fairness doctrine constitutional in the 1969 *Red Lion* case, and again relied heavily upon the doctrine in the 1973 *CBS* v. *DNC* case (with only two dissenters to its constiutionality—Justices Stewart and Douglas). There is no indication that the 1974 *Miami Herald* case overturned the *CBS* case, decided just one year before. Significantly, Shayon points out, the most recent Court treatment, by Judge Leventhal in the NBC *Pensions* case, distinguishes the *Miami Herald* decision, and adheres to the fairness doctrine in the broadcasting field.

How can one square these persuasive arguments on both sides? And particularly how can one square the strong holding quoted by Dick Jencks from the *Miami Herald* case with the statement in *Red Lion* that "there is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves" (395 U.S. at p. 394).

There is no *logical* way to do so. Bob Shayon gave the practical answer in his Holmes quotation that the life of the law has not been logic; it has been experience. And in the broadcasting field the experience, "almost from the beginning" (*Pensions*, p. 13), has been different from the print medium. From the 1943 *NBC* case to the 1973 *CBS* case, regulation of broadcasting under a short-term, public interest licensing scheme has been sustained—and that is why the fairness doctrine decisions have gone in the FCC's favor.

Dick Jencks believes that when the right case is presented to the Supreme Court—one like *Brandywine* (*WXUR*) where the station lost its license because of fairness doctrine violations, among other things—the Supreme Court will strike down the doctrine. I think Boy Shayon is more apt to prove correct on this issue. The Supreme Court had the opportunity to review *Brandywine*, with Judge Bazelon's powerful dissent on the fairness doctrine—yet it declined to do so.

More important, it seems to me most unlikely that the Burger-led Court will flip-flop on this issue. Remember that Chief Justice Burger wrote both the 1973 *CBS v. DNC* and the 1974 *Miami Herald* opinions, so it is unlikely that the latter overrules the former. And Chief Justice Burger is the author of the *WLBT* opinion, where he states that ". . . adherence to the Fairness Doctrine is the *sine qua non* of every licensee" (359 F.2d at p. 1009). The odds, therefore, are strong for continued affirmance of the constitutionality of the fairness doctrine itself (as compared with the different issue of the legality of its general *implementation* or some particular application of the doctrine).

2. On the second issue, both debaters again cogently set forth strong arguments. Dick Jencks stressed that it is *Government* trying to insure fairness; that no one would or should desire that the Government review the editorial decisions of the Washington *Post* or the New York *Times* for fairness—why then should Governmental review for fairness of the editorial processes of NBC, CBS, or ABC be welcomed or desirable? In my opinion, Jencks does not make out a strong case that Governmental review has had a "chilling" effect on the networks' treatment of controversial issues.

The networks are "big boys" who can and do stand up to the Commission (e.g., *Pensions*). Jencks' main example, "The Loyal Opposition" program, was not dropped by CBS because of the FCC ruling (which did not really inhibit the presentation of any future programs—CBS could merely specify 10 or more issues to be addressed by the spokesman or spokesmen); the program simply did not meet CBS' expectations and indeed, CBS appeared embarrassed over it in its Congressional testimony (25 FCC 2d at p. 300, n. 25). But Jencks does score with his contention that FCC fairness activities can be "chilling" as to the smaller broadcast station. While I am admittedly biased on this score, I believe that fairness cases like KREM-TV (the Spokane, Washington ruling cited by Jencks) cannot be answed by facile recitation of fairness statistics (i.e., Shayon's observation that in over 2000 fairness complaints, the Commission referred only 168 to stations and ruled against the licensee in only five instances).

The KREM-TV ruling was favorable to the licensee, but the three-year hassle clearly might well inhibit future station coverage of contested local issues. Further, Jencks raises the disturbing point: Is such an intensive intervention in the broadcast editorial process worth the possible "plus"—that an entirely different audience hear some further presentation on an issue two or three years later?

On the other hand, Shayon correctly stresses the fundamental relationship of the fairness obligation to the notion of the public trustee. The Congressional scheme is one of short-term licensees who obtain the right to use scarce, valuable radio spectrum free because they have volunteered to serve the public interest. Shayon then points to the WLBT (Jackson, Mississippi) case where a licensee would not present the integration viewpoint, largely ignored the extensive black population in its service area, and espoused the segregational cause.

How can a licensee, who uses the frequency only to reflect his *private* views on issues of great importance to the area, be said to be a public trustee? Just as the antitrust laws provide an overlay or national mood fostering competition, the fairness doctrine affords protection that generally licensees will act responsibly "as proxies for the entire community, obligated to suitable time and attention to matters of great public concern" (*Red Lion*, 395 U.S. at 394).

Here again the debate presents an oddity—each side has advanced powerful First Amendment arguments *for* his position and faces serious First Amendments *against* his position. Again—just to state the commentator's views—it seems to me that Shayon's overall position will reflect governing policy in the next decade. For, one could ask Dick Jencks: Would elimination of the fairness doctrine really free broadcast journalism?

Remember that the present Congressional scheme for broadcasting involves the Government significantly in the licensee's overall programming operation. It *is* a licensing scheme in the public interest, and because programming is the heart of service to the public, the incumbent's overall programming operation is the crucial element examined at renewal, whether in a petition-to-deny situation or in a comparative hearing. This means that CBS' renewal of WCAU-TV in Philadelphia or the Washington Post's renewals in Florida will be judged on whether the incumbent licensee has rendered substantial service to meet the problems, needs, and interests of the area.

Further, the agency can affect the economic health of the licensee or network in many other non-licensing areas—for example, by changing the multiple ownership rules applicable to networks or large VHF stations, or changing the network programming process through prime-time access and syndication rules.

My point is obvious: Unlike print, the Government is integrally involved in the broadcasting field. So long as one maintains the public interest licensing and pervasive regulatory scheme, elimination of the fairness doctrine does not free the broadcast licensee from the danger of undue Governmental pressure or intrusion, but it does eliminate the check on licensees who would act like WLBT.

In my judgment, therefore, it better serves both the public interest and the First Amendment to retain the fairness doctrine, so long as the public trustee interest licensing scheme is kept.

Both Jencks and Shayon correctly observe that there is no *Constitutional* need to maintain that system—that while the Government must license to prevent engineering chaos, there are other alternatives that would serve the public interest and yet free the licensee from Governmental intrusion (e.g., auction or rental of the frequency, with the proceeds going to non-commercial broadcasting or access programming, and with certain rights to paid or free access for limited periods). However, such alternatives are not likely to be adopted in the near future, if ever. If this analysis is correct, the fairness doctrine will continue to be applicable in the next decade, and its problems must therefore be dealt with.

The *Pensions* case is indicative of one trend to deal with these problems. It creates a *mood* that looks with disfavor on governmental intrusion in broadcast journalism, except perhaps in egregious circumstances. Such a mood may be difficult to define and may change over time. But it is nonetheless of great importance for the administration of the fairness doctrine in the coming years.

As Dick Jencks notes, I believe that a further revision is needed to "save the fairness doctrine"—that the Commission should generally examine fairness matters only at renewal time, and then to determine "whether there had been such a pattern of conduct throughout the license period as to indicate malice or reckless disregard of Fairness obligations." (p. 7, Jencks). I can appreciate why Jencks, like Oliver Twist, wants more, but it seems to me that he is not fully taking into account the public trustee nature of the present pervasive regulatory scheme.

Judge J. Skelly Wright has pointed out that unlike " . . . some areas of the law [where] it is easy to tell the good guys from the bad guys . . . in the current debate over the broadcast media and the First Amendment . . . each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication." The answers, he pointed out, "are not easy," but he hoped that "with careful study" . . . we will find some." Dick Jencks and Bob Shayon admirably illustrate Judge Wright's point. Both are "good guys" strongly committed to promoting First Amendment goals. Both deplore broadcaster indifference to these goals. And both have made an excellent contribution to the study of the fairness doctrine and to possible courses of action.

XVII

*Affirmative Promotion of Freedom of Expression**

The most challenging problems in First Amendment theory today lie in the prospect of using law affirmatively to promote more effective functioning of the system of freedom of expression. The traditional premises of the system are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communication. In supporting this system the First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other social interests that the government seeks to safeguard. The development of legal doctrine has been primarily in the evolution of a series of negative commands. A realistic view of the system of freedom of expression in this country today, however, discloses serious deficiencies that call for a different kind of First Amendment approach.

There are numerous reasons for the failures now threatening the existence of the system. Probably the most significant is the overpowering monopoly over the means of communication acquired by the mass media. Two international news services, Associated Press and United Press International, furnish most of the international news. In 1967, out of 1,547 cities with daily newspapers, there were competing dailies in only 64. Three gigantic networks, ABC, CBS, and NBC, determine most of what is seen in American homes on television. In 1966, thirty-five advertisers supplied over 50 percent of television's total advertising income. In 1967, newspapers held interests in a third of the VHF stations and in 22 percent of the UHF stations. In the same year some twenty-five Congressmen or their families owned interests in radio and television properties, and about a half of the members of Congress were members of law firms that represented broadcasters. The economics of radio and television press inevitably in the direction of programs that appeal to the lowest common denominator of a mass audience. The consequence of all this is that the expression emanating from the mass media tends to represent a single, generally bland, point of view.[1]

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*Thomas Irwin Emerson. The System of Freedom of Expression. Affirmative promotion of freedom of expression, ch. 17, pp. 627–673. Reprinted with the permission of the author. Copyright 1970.

Other factors are less overwhelming, but still important. Modern government, by virtue of its size, resources, control of information, and links to the mass media, plays a more dominant and narrowing role in the system. The issues in a technical age grow constantly more complex, and there is at the same time a bewildering mass of information on some subjects and a frustrating paucity of information on others. Costs of all methods of communication steadily rise, beyond the means of the individual or the ordinary group. The growth of voluntary associations on a mass scale, while solving some problems, adds to the disadvantage of the non-belonging person or the less powerful organization.

The result is that the system is choked with communications based upon the conventional wisdom and becomes incapable of performing its basic function. Search for the truth is handicapped because much of the argument is never heard or heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble. The possibility of orderly social change is greatly diminished because those persons with the most urgent grievances come to believe the system is unworkable and merely shields the existing order. Under these circumstances it becomes essential, if the system is to survive, that a search be made for ways to use the law and legal institutions in an affirmative program to restore the system to effective working order.

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[1] The figures are taken from Bryce W. Rucker, *The First Freedom* (Carbondale, Southern Illinois University Press, 1968). See also Dan Lacy, *Freedom and Communications* (Urbana, University of Illinois Press, 2d ed. 1965); James R. Wiggins, *Freedom or Secrecy* (New York, Oxford University Press, rev. ed. 1964); Charles A. Reich, "Making Free Speech Audible," *The Nation*, Feb. 8, 1965, p. 138; and other materials cited in Thomas I. Emerson, David Haber and Norman Dorsen, *Political and Civil Rights in the United States* (Boston, Little, Brown & Co., 3d ed. 1967), pp. 900–901 (cited hereafter in this chapter as *Political and Civil Rights in the United States*).

In general, the government must affirmatively make available the opportunity for expression as well as protect it from encroachment. This means that positive measures must be taken to assure the ability to speak despite economic or other barriers. It also means that greater attention must be given to the right of the citizen to hear varying points of view and the right to have access to information upon which such points of view can be intelligently based. Thus, equally with the right and ability to speak, such an approach would stress the right to hear and the right to know.

In terms of First Amendment theory the issues fall into two categories. In the first situation the government relies upon some existing power as the basis for regulation designed to improve operation of the system of freedom of expression. Thus the Federal Government may seek, through use of the commerce power, to require broadcasting stations to give equal time to all political candidates; or a State may, under its general police powers, require disclosure of the sources of campaign contributions. The question is whether, since such a regulation impinges upon freedom of expression, it is permissible under the First Amendment. This issue, however, is not like the question that arises when the government places restrictions upon expression in order to protect or advance some other kind of social interest outside the system of freedom of expression. As an affirmative measure the regulation has its impact entirely within the system; it is designed to make the system work better, not to limit expression in order to promote a conflicting interest. Hence the ordinary First Amendment tests —bad tendency, incitement, clear and present danger, balancing of opposing interests, and full protection—are not applicable. The problem must be resolved in terms of whether there has been an "abridgment" of freedom of expression, and the tests must be framed in terms of accommodation of interests within the system, nondiscrimination, promotion rather than deterrence of expression, and the like.[2]

A second kind of problem arises when governmental power to facilitate operation of the system is sought in the First Amendment itself. Such affirmative power of the First Amendment may be invoked in two forms. In one it is self-executing and enforceable by the courts as a constitutional mandate. Thus the claim that a local board of education must make a school building available for public meetings would rest upon the principle that the First Amendment of its own force requires such action. In its other form the affirmative power of the First Amendment manifests itself as the basis for legislation. This might be Federal legislation enacted directly by virtue of the First Amendment, or Federal legislation enacted under Section 5 of the Fourteenth Amendment, which makes the First Amendment applicable to the States. Such uses of the First Amendment as an affirmative power are, of course, rare. But some development of the law has begun in this direction. Here again the applicable tests are quite different from those employed in traditional situations in which the First Amendment is invoked purely as a negative right against government interference.

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[2] The issues are much the same as those that arise in maintaining traffic controls over the right of expression, discussed in Chapter IX.

Apart from the task of developing suitable First Amendment doctrine, grave administrative and procedural problems are posed by any effort to employ governmental authority to facilitate operation of the system of freedom of expression. The attempt to use governmental power to achieve some limited objective, while at the same time keeping the power under control, is always a risky enterprise. Nowhere is this truer than in the area of freedom of expression. Nevertheless there is no alternative. The weaknesses of the existing system are so profound that failure to act is the more dangerous course. Moreover, the government is already deeply involved at many points, some of great importance, as in its regulation of radio and television. The same kind of movement may be found in other areas of individual rights today, such as the development of the affirmative aspects of the equal protection clause. The only prudent course, then, is to formulate principles and devise techniques that use social power to facilitate freedom of expression while holding the instrument of that power in check.[3]

[3] The first comprehensive effort to consider the question of affirmative promotion of a system of freedom of expression was made in Zechariah Chafee, Jr., *Government and Mass Communications* (Chicago, University of Chicago Press, 1947; reprinted Hamden, Conn., Archon Books, 1965). A recent discussion that has aroused a good deal of interest is Jerome A. Barron, "Access to the Press—A New First Amendment Right," *Harvard Law Review*, Vol. 80 (1967), p. 1641, and "An Emerging First Amendment Right of Access to the Media?" *George Washington Law Review*, Vol. 37 (1969), p. 487. Materials and references dealing with many of the problems discussed in this chapter may be found in Donald M. Gillmor and Jerome A. Barron, *Mass Communication Law: Cases and Comment* (St. Paul, Minn., West Publishing Co., 1969). See also Charles A. Reich, "The Law of the Planned Society," *Yale Law Journal*, Vol. 75 (1966), p. 1227; Louis H. Mayo, "The Limited Forum," *George Washington Law Review*, Vol. 22 (1954), p. 261.

A. Establishing the Basic Conditions

The initial responsibility of the government is to maintain the basic conditions that a system of freedom of expression requires in order, not just to exist, but to flourish. This obligation is, of course, one that the state owes to all institutions, inside and outside the government, that seek to further the goals of the individual within the society. The government must establish fundamental law and order, must provide essential community services, and must create the underlying economic, social and political circumstances in which systems not based on the use of official force may successfully operate. Even in the case of religious institutions, for which the Constitution specifically prescribes firm separation, the government nevertheless supplies police protection, fire protection, and other services generally made available to the community. Clearly the obligation of the government to support a system of freedom of expression is vastly more extensive and compelling.

Most of the measures designed to achieve these ends operate from outside the system and do not raise any serious First Amendment problems. Ordinarily protection of expression against interference by private persons through force or violence is an accepted role for the police. Similarly other standard governmental aids, such as the right of a group to incorporate, are available to associations engaged in expression in the same manner as to other noncommercial associations. Even devices specifically enacted to promote the system of free expression, such as exempting news reporters from the normal obligation to give testimony in order to protect the confidentiality of news sources, do not pose any First Amendment difficulties. Likewise, measures taken by the Federal Government to eliminate interference with First Amendment rights by a State or its agents, such as the Federal Civil Rights Acts or the laws allowing removal of State prosecutions to Federal courts, are not restricted in any way by First Amendment limitations. Only occasionally in the administration of these provisions, as in the case of the hostile audience or the heckler, do First Amendment issues emerge.[4]

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[4] With respect to measures designed to protect news sources see Talbot D'Alemberte, "Journalists Under the Axe: Protection of Confidential Sources of Information," *Harvard Journal of Legislation*, Vol. 6 (1969), p. 307, and material there cited; James A. Quest and Alan L. Stanzler, "The Constitutional Argument

In one area of police protection, however, difficult questions arise. To what extent is it the responsibility of the government to protect expression against interference from private (nongovernmental) sources other than when such interference takes the form of force or violence? Clearly there are limits. The system of freedom of expression contemplates that many kinds of private pressures—economic, social and personal—will be at work as the community attempts to reach social decisions. The government cannot and should not undertake to prevent or regulate these forms of interchange. On the other hand sometimes such pressures go beyond the bounds of what can be tolerated by a system of expression that can be called "free." This occurs primarily in the case of economic pressure. The economic power of an employer over an employee, a landlord over a tenant, or a highly organized group of union members over a business enterprise may result in coercion upon expression which has all the effect of physical force or violence. The issue resolves itself into one of drawing the line between expression and action. Pressures that can be classified as action are subject to state control, whenever such control is deemed necessary or appropriate, without raising any issue under the First Amendment. Pressure in the nature of expression cannot be abridged in any way.[5]

Some of the measures taken by government to maintain the basic conditions for the functioning of freedom of expression operate wholly within the system itself. The main examples of these are traffic controls, whose regulation of the time, place and manner of expression is essential to prevent conflict. The First Amendment issues arising out of such provisions have been discussed in connection with the right of assembly. If the circumstances require more intensive methods of control, owing to scarcity of facilities for expression or similar factors, government regulation moves beyond mere traffic controls into problems of allocation, accessibility, and diversity.

In general then, with the exceptions noted, the problems in this area do not involve want of power, or concern over the limitations imposed by the First Amendment, but issues of performance. The crucial need is that the society act with vigor and imagination to give

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for Newsmen Concealing Their Sources," *Northwestern University Law Review*, Vol. 64 (1969), p. 18. On the hostile audience and heckler problems see Chapter IX.

[5] See the discussion of boycotts and economic pressures in Chapter XII. The question of when interference emanates from private sources and when from governmental sources presents a question of state action, varying aspects of which are discussed throughout this book.

affirmative support to the system of freedom of expression. This is especially important in the very broadest areas of affirmative action—the maintenance of fundamental economic, political and social conditions necessary for a system of freedom of expression to survive at all.

B. Purification of the System

Freedom of speech, Justice Douglas has said, may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Justice Brennan has emphasized that in a democratic society speech should be "uninhibited, robust, and wide-open." A healthy system of freedom of expression embraces all this and more. It contains much that is deliberately false, and much more that is misleading or deceptive. The personal motives of the speaker, financial or otherwise, are usually not revealed, and the listener must make his own discount for bias or ulterior purpose. Often the communication is anonymous or emanates from a source that is concealed. The system is crammed with expression that appeals far more to passion than to reason. In short, participants in the system are likely to violate all the rules for communication between gentlemen.[6]

The temptation to clean up the system is naturally strong and persistent. Very often, as we have seen, efforts to improve the content of the system are undertaken in an attempt to curtail expression that is thought to harm other social interests. But sometimes efforts are made simply to refine the system as a system. Controls are imposed solely to promote the goals of the system—to introduce honesty, decency and openness into it—and thereby to improve the quality and meaningfulness of expression. In this situation, as just noted, different rules for the application of the First Amendment must apply.

The essential consideration is that, while certain limited forms of control may improve the performance of the system, such controls cannot be imposed on any broad scale without destroying the system altogether. This is true not only because the government has no authority to determine the content or value of particular expression. Even if the regulation does not touch on such matters, the mere presence of the government, with its apparatus for investigating, deciding and enforcing, is repressive and likely to inhibit the system. Moreover, it is always difficult for a court to determine the motive or effect of a given form of control and the regulation may thus in fact operate to limit rather than to expand the system. In addition the regulations are likely to be vague and uncertain in their impact and almost invariably operate to curtail unorthodox, unpopular or minority expression. In these respects the purification controls are different from those designed to regulate the physical ordering of expression, such as traffic controls. Hence any regulation of this nature presents a danger to the system and can be tolerated in the system only under the most exceptional circumstances.

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[6] The quotations are from *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949), and *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

On the basis of these considerations the controlling principles can be stated:

(1) In general, purification controls constitute an "abridgment" of expression and hence are invalid. They may not be an "abridgment," however, in exceptional situations in which the regulation, in light of its impact on the whole system, operates to expand rather than contract freedom of expression.

(2) In applying this rule the burden of proof is on the proponents of the regulation to establish (a) that the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that end, and that this objective cannot be achieved by other means; (b) that the regulation does not limit the content of expression; (c) that the regulation operates equitably and with no undue advantage to any group or point of view; (d) that the control is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.

The principal areas in which purification controls have been attempted are (1) corrupt practices legislation and similar controls dealing with the electoral process; (2) lobbying legislation; and (3) various other types of disclosure requirements. Libel and group libel laws are partly intended to purify the system but are mainly directed against the harm thought to accrue to other social interests.

1. CORRUPT PRACTICES LEGISLATION AND SIMILAR CONTROLS OVER THE ELECTION PROCESS

Federal and State legislation regulating "corrupt practices" in election campaigns and similar legislation dealing with other aspects of the election process is widespread and varied. In general it takes the form of (a) requiring disclosure of the sources of campaign funds and an accounting of expenditures; (b) limiting the amounts contributed or spent for campaign purposes; (c) prohibiting certain groups from contributing or spending in campaigns; (d) requiring disclosure of the authorship or sponsorship of campaign literature; and (e) other regulations designed to improve the conduct of elections. All of these regulations, of course, impinge upon freedom of expression; the issue is whether they "abridge" it. The Supreme Court decisions on the subject are scattered and, while they mark out some of the boundaries, do not throw much light upon the principles involved.[7]

The first direct decision of the Supreme Court in this area came in *Burroughs and Cannon v. United States*, decided in 1934. In that case the Court upheld the validity of the Federal Corrupt Practices Act of 1925, which required all political organizations to render a detailed accounting of contributions received and expenditures made for the purpose of influencing the election of presidential electors or candidates in two or more States. The main constitutional issue discussed by the Court was whether the Federal Government, or only the States, possessed the power to enact such legislation. No issue under the First Amendment was raised by the parties or considered by the Court. Nor has the First Amendment question been decided by the Court in any subsequent case. Hence, while the result is known, the Court's reasoning is not.[8]

The second type of corrupt practices legislation places a ceiling upon the amount of contributions and expenditures in political campaigns. The main provisions of this nature in the present Federal law were enacted in the Hatch Act of 1939. While this kind of regulation has never been the subject of Supreme Court decision, its constitutionality seems to have been taken for granted by virtue of the *Burroughs* case.[9]

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[7] For a collection of materials and references upon corrupt practices and similar legislation see *Political and Civil Rights in the United States*, pp. 624–628, 641–645.

[8] *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934). See also *Hadnott v. Amos*, 394 U.S. 358 (1969).

The third type, prohibiting certain groups from giving or spending funds in political campaigns, has received more judicial attention. These issues were presented to the Supreme Court in two cases involving Section 304 of the Taft-Hartley Act of 1947. That provision makes it unlawful for any corporation or labor organization "to make a contribution or expenditure in connection with any election" for Federal office, or "in connection with any primary election or political convention or caucus held to select candidates" for such an office. Shortly after passage of the legislation, the Congress of Industrial Organizations moved to test its constitutionality. The "C.I.O. News," a weekly periodical published by the C.I.O., carried a statement by C.I.O. President Philip Murray urging all C.I.O. members to vote for Judge Ed Garmatz for Congress in a special election in Maryland. Murray and the C.I.O. were indicted for violation of Section 304. The District Court dismissed the indictment on the ground that the statute was invalid under the First Amendment, saying "no clear and present danger to the public interest can be found in the circumstances surrounding the enactment of this legislation." In *United States v. Congress of Industrial Organizations* the Supreme Court unanimously affirmed the District Court. The majority did not reach the constitutional issue, however, as they construed Section 304 not to prohibit publication of the article. Justices Rutledge, Black, Douglas, and Murphy, disagreeing on the interpretation of the statute, would have decided the constitutional question and held the statute invalid as a violation of the First Amendment. Justice Rutledge, writing for this minority, explored the issues at length. His conclusion was that, although some form of regulation might be permissible, a complete prohibition was overbroad and invalid. He also expressed objections on the grounds of vagueness.[10]

The question again reached the Supreme Court in *United States v. International Union United Automobile Workers* in 1957. Here the indictment alleged that during the 1954 elections the U.A.W. had spent some six thousand dollars for a series of television broadcasts in which it had urged the election of certain candidates to Congress. The District Court dismissed the indictment on the ground that "Congress did not intend to write an unconstitutional law" and that the expenditures were "not prohibited by the Act." This time the Supreme Court reversed, holding that the expenditures were covered by the Act, and remanded the case to the District Court for trial. Again the majority declined to pass on First Amendment issues, preferring to postpone those questions until a complete record had been made at the trial. Justice Douglas, in an opinion with which Chief Justice Warren and Justice Black joined, dissented. He conceded that "[i]f Congress is of the opinion that large contributions by labor unions to candidates for office and to political parties have had an undue influence upon the conduct of elections, it can prohibit such contributions," and that "in expressing their views on the issues and candidates, labor unions can be required to acknowledge their authorship and support of those expressions." But he declared that Section 304 was not "narrowly drawn" and "abolishes First Amendment rights on a wholesale basis."[11]

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[9] The Hatch Act provisions are 18 U.S.C. §§608 and 609. The history of Federal corrupt practices legislation is traced in Justice Frankfurter's opinion in *United States v. International Union United Automobile Workers*, 352 U.S. 567 (1957).

[10] 18 U.S.C. §610; *United States v. C.I.O.*, 335 U.S. 106 (1948).

The U.A.W., on going to trial, obtained an acquittal and thus the case never got back to the Supreme Court. Nor has any other case under Section 304 come before the Court. At present both unions and corporations have found sufficient loopholes in the law to make it unnecessary for them to press close to the line of violating the statute. Consequently we have no expression of opinion by a majority of the Court on the First Amendment issues, although its eagerness to put off decision would seem to indicate it had serious doubts that the legislation would survive constitutional scrutiny. Justices Rutledge and Douglas, proceeding on theories of overbreadth and vagueness, did not find it necessary to carry the argument beyond that point.

The fourth type of corrupt practices law, prohibiting the distribution of anonymous campaign literature, is found in most of the States and in the Federal legislation. The New York statute was attacked in *Golden v. Zwickler* and held invalid by a Federal three-judge court on First Amendment grounds. The Supreme Court reversed the case for reasons of mootness. Hence the status of such legislation remains uncertain.[12]

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[11] *United States v. International Union United Automobile Workers*, 138 F. Supp. 53, 59 (E.D. Mich. 1956), 352 U.S. 567, 598, 597 (1957). For materials discussing Section 304 and the cases arising under it, as well as similar State legislation, see *Political and Civil Rights in the United States*, p. 627.

[12] *Golden v. Zwickler*, 290 F. Supp. 244 (E.D.N.Y. 1968), 394 U.S. 103 (1969). The case was previously before the Court, on the question of whether the Federal courts should take jurisdiction at that stage, in *Zwickler v. Koota*, 389 U.S. 241 (1967). The Federal statute, 18 U.S.C. §612, was upheld in *United States*

Another form of corrupt practices legislation came before the Supreme Court in *Mills v. Alabama*. That case involved an Alabama statute which made it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." The statute had been applied to convict the editor of the *Birmingham Post Herald* for publishing an editorial, supporting a mayor-council form of government, on the day an election was being held to decide between a city commissioner and a mayor-council plan. The Supreme Court unanimously reversed, Justice Black writing for all members of the Court except Justice Harlan. After describing the role of the press in a system of freedom of expression, Justice Black simply concluded: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." He then took note of Alabama's justification for the statute—that it "protects the public from confusive last-minute charges and countercharges" when there is no time to answer. To this he replied that the argument, "even if it were relevant to the constitutionality of the law," had a "fatal flaw" because the statute merely moved the time at which no reply was possible one day ahead. Justice Black then ended: "We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." [13]

The Supreme Court's decisions in the corrupt practices cases, admittedly incomplete, leave unresolved a host of questions. In *Mills* Justice Black appears to be applying his absolute test, though he makes a slight bow in the direction of a "reasonableness" doctrine. The other justices, apart from Justice Harlan, apparently acquiesce. It is hard to see how the absolute test can be applied here without overruling *Burroughs* and invalidating other types of corrupt practices legislation. Yet no effort is made to draw a line between the two or to suggest a theory upon which a distinction should be based.

Moreover, the cases raise questions that go beyond the corrupt

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v. Scott, 195 F. Supp. 440 (D.N.D. 1961). For other material on the matter see *Political and Civil Rights in the United States*, p. 628.

[13] *Mills v. Alabama*, 384 U.S. 214, 219–220 (1966). Justice Harlan concurred on the ground that the statute did not give fair warning that "publication of an editorial of this kind was reached" by the provision under which the defendant was convicted. 384 U.S. at 223.

practices area. If a candidate in an election can be required to disclose his income and expenditures for expression, why cannot all other persons be required to make similar disclosures in connection with other expression? If the government can equalize the amount of speech uttered in a campaign, by controlling the volume of expenditure for expression, why cannot it equalize the amount of speech uttered on any subject? Is it the implication of the *Burroughs* decision that the government has almost unlimited power to allocate resources available for expression, or to regulate access to the marketplace of ideas? The Supreme Court has advanced no theory upon which to base an answer to these questions.

If one undertakes to apply the five criteria suggested above as limiting governmental attempts to purify the system of freedom of expression, progress toward a solution is possible. By a liberal application of the suggested criteria one might conceivably sustain all forms of corrupt practices legislation, except the total prohibition on expression embodied in Section 304 of the Taft-Hartley Act, as well as many regulations for disclosure and equalization in other areas. But if the criteria are applied strictly, as they should be, it is likely one would come out with the proposition that such forms of regulation must be limited to restrictions (1) on the candidate himself, (2) in an election campaign.

For example, the main abuse at which disclosure legislation is directed is the possible influence of large contributions upon the candidate himself, and the primary concern of the equalization provision is the potential monopoly control over expression conferred upon the candidate. Funds expended for expression by the electorate at large do not generate equivalent dangers. Hence a control narrowly limited to correct a grave abuse would not reach beyond restrictions upon the candidate himself, and would not be justified outside the election process. Again, the impact of disclosure upon a candidate who is openly running for office is quite different from that upon a member of the general public who has not officially exposed himself to the public eye. Hence regulation of the candidate would not normally limit the content of expression in the way that disclosure regulation applicable to others would. Measures to assure equality of access to the marketplace by candidates could be drawn equitably, since each candidate has an equal interest. But the same would not be true of the many diverse interests represented in the public at large. Of course, controls that amounted to total prohibition, rather than regulation, would be outlawed whether applied to candidates or to others. Finally, regulations confined to candidates and election campaigns are directed to a limited end and deal with a limited situation. Hence they can be formulated with some objectivity and avoid the dangers of abuse in administration. This cannot be done with regulations, particularly equalization regulations, addressed to the innumerable different kinds of people seeking to express themselves for different purposes throughout the whole system of free expression.

The results derived from such an analysis would not differ markedly from the position the courts seem to have reached in this field. Disclosure and equalization legislation would be limited to candidates, and to that extent *Burroughs* would be modified. Section 304 of the Taft-Hartley Act would be invalid, except to the extent that corporations could be controlled on the theory they were part of the commercial sector and thus outside the regular system of freedom of expression. Zwickler would prevail in his attack on the New York statute, although the rule against anonymous campaign literature could be enforced against candidates. The statute considered in *Mills* would fall. Possibly application of the criteria here suggested as controlling would lead some to other conclusions. But at least this kind of approach would be based upon the functions and requirements of the system of freedom of expression.

2. LOBBYING LEGISLATION

Virtually all States and the Federal Government have enacted legislation to regulate lobbying. Most of this legislation is of the disclosure type, requiring the registration of persons engaged in lobbying and a public accounting of the sources of funds and expenditures. As in the case of election legislation, it is clear that controls of this nature impinge upon freedom of expression. No general requirement of registration prior to exercising the right to freedom of speech or to petition the government, and no general demand for an accounting of funds used, would conceivably be sustained under the First Amendment.

The Supreme Court addressed itself to these issues, as they related to the Federal Regulation of Lobbying Act, in *United States v. Harriss*, decided in 1954. The provisions of the Act were complex, loosely phrased, and extremely broad. Roughly they required detailed reports to Congress from any person "receiving any contribution or expending any money" for the purpose of "influen[cing], directly or indirectly, the passage or defeat of any legislation" before Congress. An information charging an organization and two individuals with failure to report was dismissed by the District Court on the ground that the Act was unconstitutional. The Supreme Court, construing the statute narrowly, reversed. Chief Justice Warren, writing for the majority, interpreted the Act as applying only to persons who received contributions for lobbying purposes or were paid lobbyists and who attempted to influence legislation "through direct communication with members of Congress." This excluded all amateur lobbying and all use of expression to influence Congress other than by "direct communication" with a Congressman. As thus construed, Chief Justice Warren held, the statute did not violate the First Amendment. After pointing out that the purpose of the legislation was to allow members of Congress to "properly evaluate" the "myriad pressures to which they are regularly subjected" and that otherwise "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal," he went on:

> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process. See *Burroughs and Cannon v. United States*, 290 U.S. 534, 545.
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> Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end.[14]

Justice Douglas, with whom Justice Black concurred, dissented on grounds of overbreadth and vagueness. He conceded, however, that narrowly drawn lobbying legislation would be valid, saying: "I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups." [15]

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[14] *United States v. Harriss*, 347 U.S. 612, 623, 625–626 (1954).

Chief Justice Warren, while referring to a number of relevant factors, did not spell out any precise theory as the basis for his decision. Nor did Justices Douglas and Black indicate how narrowly drawn lobbying legislation could be reconciled with their absolute theory. In actuality, except by facile use of the ad hoc balancing test, lobbying legislation is difficult to reconcile with the principles of the First Amendment.

In some ways lobbying legislation is similar to corrupt practices legislation. It is designed to improve the system of freedom of expression by allowing the legislator to weigh expression addressed to him through having knowledge of its source. It is also an attempt to equalize access to the legislator by discouraging an excessive volume of communication from a few sources. But it is doubtful whether, in the context of the legislature, these possible distortions of the system are sufficiently grave to warrant interference by the government. Indeed, lobbying legislation really has other objectives. It is primarily intended to curtail bribery or expose the political motivations of the legislator to the electorate, interests that cannot constitutionally be advanced by curtailing expression. Hence lobbying legislation may not satisfy the first criterion listed above for regulation intended to purify the system. On the other hand such legislation may meet the other four criteria about as well as corrupt practices legislation does. In any event, if lobbying legislation is sustainable it would be so only on the theory that it is narrowly confined to the special problem of the legislature and, as declared in *Harriss*, to direct communication with the legislator by a paid lobbyist. Thus far lobbying legislation has proved notoriously unsuccessful in practice.

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[15] 347 U.S. at 632. The Supreme Court had previously drawn a similar line, at the point of direct communication with members of Congress, in *United States v. Rumely*, 345 U.S. 41 (1953), a legislative committee case. See Chapter VIII. For reference to material on lobbying legislation see *Political and Civil Rights in the United States*, p. 641. Other cases concerned with lobbying and the First Amendment are *Cammarano v. United States*, 358 U.S. 498 (1959), and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), discussed in Chapter XII. On state lobbying laws see Edgar Lane, *Lobbying and the Law* (Berkeley, University of California Press, 1964).

3. OTHER DISCLOSURE LEGISLATION

Apart from the disclosure requirements found in corrupt practices and lobbying legislation, other forms of disclosure regulation have from time to time been enacted or proposed. Much of this has been designed to promote interests outside the system of freedom of expression, and does not concern us here. But some has been directed at improving the system itself, or at least has been justified in part on that ground. Thus for many years a Post Office regulation has required that newspapers and other publications wishing to avail themselves of second class mailing privileges must file with the Post Office and make public information concerning stockholders and ownership. Similarly the Foreign Agents Registration Act provides for registration of "any person who acts or agrees to act . . . as . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative or attorney for a foreign principal." In the period following World War II interest in disclosure legislation increased. Thus President Truman's Committee on Civil Rights recommended in its 1947 Report the "enactment by Congress and the state legislatures of legislation requiring all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves through systematic registration procedures." Such proposals were aimed primarily at the Communist Party and other groups thought to be associated with it, and formed the original basis for legislation that ultimately emerged as the Internal Security Act of 1950. With the enactment of that statute, however, it became apparent that disclosure requirements could in practice operate as a serious deterrent to freedom of expression, virtually the equivalent of a criminal sanction. Moreover, about this time some of the Southern States began to utilize disclosure requirements as a method of attacking the N.A.A.C.P. and other civil-rights organizations. As a result of these developments suggestions for purification of the system of freedom of expression through disclosure regulation went out of fashion and the issues have remained of only minor importance.[16]

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[16] 39 U.S.C. §4369 (Post Office regulation); 22 U.S.C. §611–621 (Foreign Agents Registration Act); President Truman's Committee on Civil Rights, *To Secure These Rights* (Washington, D.C., G.P.O., 1947), pp. 164, 51–53. On the Internal Security Act see Chapter V, and on disclosure requirements applied to civil-rights organizations see Chapter XII. For a collection of materials and references on disclosure see *Political and Civil Rights in the United States*, pp. 188–189, 559–560.

The Supreme Court's decisions on the subject have been scattered and inconclusive. The Post Office regulation was upheld in *Lewis Publishing Co. v. Morgan*, but that was in 1913 and there was little discussion of the First Amendment. The validity of the Foreign Agents Registration Act has never been seriously challenged and in fact has been assumed, but that legislation deals with the special problem of foreign control over the speaker. The registration provisions of the Internal Security Act were upheld in *Communist Party v. Subversive Activities Control Board*, but again the decision ultimately rested upon the foreign control element. The closest approach to the problem made by the Supreme Court was in *Talley v. California*. The Los Angeles ordinance involved in that case prohibited the distribution of handbills that did not identify the author or producer and the distributor. Justice Black, writing for a majority of five, applied his absolute test, saying only: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." Justice Black did not distinguish between the case of the disclosure requirement designed to protect another social interest and that of the one intended to improve the system of free expression. Nor did he attempt to reconcile his position with any of the previous disclosure cases.[17]

If one undertakes to probe more deeply into the issues, it is apparent that, as a general proposition, disclosure requirements will in fact seriously impair the system of freedom of expression. As Justice Black observed in *Talley*:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find

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17. *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (Post Office regulation); *Viereck v. United States*, 318 U.S. 236 (1943), and *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964) (Foreign Agents Registration Act); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Talley v. California*, 362 U.S. 60, 64 (1960). In *Talley* Justice Harlan concurred and Justices Clark, Frankfurter, and Whittaker dissented. See Chapter IX for discussion. The validity of the Foreign Agents Registration Act was also assumed in the *Communist Party* case. 367 U.S. at 99–101.

> out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.[18]

It is true of modern society, also, that there are many occasions on which individuals or groups may wish to exercise the right of expression without revealing their identity. The civil-rights organizations are only the most recent example. Disclosure requirements are thus bound to curtail expression, often from those whom it is most critical for society to hear. Moreover, the administration of such restrictions always entails the risk of violation and prosecution, arising from ignorance, mistake or harassment. This, too, is a major repressive factor.

It will be a rare situation, therefore, when a disclosure requirement enhances the system of freedom of expression, rather than doing it serious damage. Even the Post Office regulation could be inhibiting. Nor can any crucial need for eliminating abuses from the system through disclosure methods usually be shown. Perhaps subliminal communication might create such a need. Ordinarily, however, the harm to the system, or the possibility of harm, precludes the use of disclosure devices.

C. Furnishing Facilities

One important way in which the government can affirmatively promote a system of freedom of expression is by making available to individuals and groups the facilities for engaging in expression. A theoretical right of expression is of no use to a person who does not possess the physical facilities or economic resources enabling him in fact to exercise that right. The government can perform this function in two ways: it can furnish the facilities itself, or it can compel private organizations or individuals who own or control media of communication to allow other persons access to such facilities. The latter problem, which involves reconciliation of the negative and positive features of the First Amendment, is discussed in the next two sections. Here we are concerned with the power and obligation of the government to make the means of expression available on a wider scale by itself supplying the physical or economic facilities.

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[18] 362 U.S. at 64–65.

The major development in this area has occurred in the law concerning the right to use the streets, parks and public open places for purposes of assembly. There is no doubt, of course, that the government has power to make such facilities available if it chooses to do so. If it does, the First Amendment imposes certain limits upon the exercise of that power: the government may not discriminate between users, or differentiate on the basis of the content of the expression, or impose conditions other than time, place and manner. More important, despite the doubt at times expressed by the Supreme Court, there is strong support for the proposition that the government has a constitutional duty to make these facilities available for assembly purposes. That obligation flows from the nature of the right of assembly, which contemplates a public gathering that entails the use of space, and the inadequacy of other areas where a public assembly can be held. The right to use the streets, parks and open places in this way constitutes a clear-cut example of the affirmative impact of the First Amendment.

The law with respect to public buildings and other closed public spaces is less well established. The power of the government to allow these facilities to be used for purposes of expression is, again, not open to doubt. The limitations upon the government if it does so are similar to those applicable to open spaces, with appropriate modifications relating to the nature of the government's own use. That there is an affirmative obligation on the government to make such facilities available for public assembly has not yet been fully recognized by the courts, although the *Port of New York Authority* case carries some distance in that direction. Nevertheless the implications from the law of open spaces would seem to compel acceptance of a similar duty by the government in the case of closed spaces. The notion of assembly embraces the idea of indoor as well as outdoor gatherings that require space; a distinction between facilities with or without a roof seems specious. It is true that privately owned halls and meeting places are more likely to be available, in which case the obligation of the government would certainly diminish. Moreover, it would seem unlikely that a court would, or as an administrative matter could, order the government to build a facility where none was already in existence. It would not appear beyond the bounds of reason to say, however, that where a suitable government facility exists and there is no other space available, the government has a constitutional obligation to permit the public to use the facilities for purposes of expression.[19]

From these instances, then, it would appear that a positive obligation falls upon the government under the First Amendment to furnish facilities for expression if (1) the form of the expression implies the use of certain means for its realization; (2) government facilities exist that would afford such means; and (3) the government possesses a monopoly or near monopoly of such facilities, that is to say no private facilities are available. How would these principles apply in other areas?

One of the main government facilities relevant to a system of freedom of expression is the Post Office. It plays a major role in the communications process. In fact the Post Office does make its services available to all who wish to use them, services subject to the same kind of negative protection as the use of the streets, parks and open places. In a sense, therefore, the issue of affirmative rights is academic. Nevertheless, a strong case can be made for the position that the government has not only the power but the duty to make this facility available; that the individual has a constitutional right to have postal service provided. Freedom of speech and the press imply more than a right of simple expression; they include a right to communicate the expression to those willing to hear. The leaflet distribution cases, from *Lovell v. Griffin* on, are predicated upon this right of dissemination. It is a fundamental feature of a system of freedom of expression. The postal service, already in existence, has a virtual monopoly over the distribution of certain types of printed material. In such circumstances the government has an affirmative obligation under the First Amendment to furnish postal facilities.[20]

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[19] *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), cert. denied 393 U.S. 940 (1968). See also *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967). Both cases are noted in Chapter IX.

[20] On the negative protections afforded by the First Amendment against denial by the government of the postal

The case of the Government Printing Office is somewhat different. The availability of printing presses and other duplicating devices is essential to the operation of a system of freedom of expression. But in this situation there is no monopoly or near monopoly by the government; private facilities are abundant. Hence no duty falls on the government to provide such services. The government of course does have the power to make printing facilities available, and under some circumstances it might promote freedom of expression to do so.

Radio and television facilities pose some special issues. A modern system of free expression rests in major part upon the means of communication afforded by these facilities. Indeed, effective expression today depends more on these media than it does upon the use of streets, buildings, postal services, printing presses, or any other method of communication. The problem arises out of the fact that the monopoly position of the government is ambiguous in this area. If it be assumed that the government, representing the people as a whole, "owns the airways," in the same manner as the streets and parks, it would seem to follow that there is a corresponding obligation to make those facilities available for purposes of expression. In practice, however, the government has not taken possession of the airways, but allocates them to private broadcasting stations. One can hardly say that the First Amendment precludes this form of control. In any event, the government does not own or operate the actual facilities for broadcasting, and the power of the courts to compel it to do so is at best dubious. The issue is posed, therefore, in terms of allowing access to facilities maintained by private groups, a question discussed in the next section.

Constitutional claims to the use of government facilities for purposes of expression have been made only infrequently in the courts. One such contention was presented in the case of *Avins v. Rutgers*. An author had brought suit against Rutgers University, a State institution, because the *Rutgers Law Review* declined to publish an article submitted by him on the Civil Rights Act of 1875. The article concluded that, in light of the legislative history of the Act, the Supreme Court had erred in *Brown v. Board of Education* in holding that the historical background of the Fourteenth Amendment was "inconclusive" on

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service see *Hannegan v. Esquire*, 327 U.S. 146 (1946); Chafee, *op. cit. supra* note 3, ch. 13; Jay A. Sigler, "Freedom of the Mails: A Developing Right," *Georgetown Law Journal*, Vol. 54 (1965), p. 30. Other materials and references are collected in *Political and Civil Rights*, pp. 201–206, 824–826.

the subject of school desegregation. The editors of the *Law Review* rejected the article on the ground that "approaching the problem from the point of view of legislative history alone is insufficient." The author contended that the *Law Review* was discriminating against his conservative ideas. The Court of Appeals for the Third Circuit affirmed a summary judgment for Rutgers University. Pointing out that there were other law reviews and other printing facilities the Court held that the author "does not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article . . . to the exclusion of other articles deemed by the editors to be more suitable for publication." The result seems entirely correct. Apart from the fact that the charge of discrimination was found not proved, the *Rutgers Law Review* was not a neutral facility of the government open to use by anyone. It was operated for specific university purposes, in a field where there was no government monopoly, and the university was entitled to reserve it for its own purposes. It may well be that the university, as a governmental academic institution, had an obligation to present a balance of viewpoints. But it did not have to make the pages of its *Law Review* available for publication by outsiders of material having no relation to the functions of the *Review*.[21]

The argument that the affirmative power of the First Amendment may require the government to furnish facilities for communication is, however, supported by developments in the law which recognize that the First Amendment embraces a right to hear. This feature of the First Amendment has always been accepted but recent decisions have given it new prominence. Thus in *Lamont v. Postmaster General* the Supreme Court held invalid a Federal statute that placed inhibiting restrictions upon the right of persons to receive "communist political propaganda" from abroad. Justice Brennan, concurring, noted the significance of the ruling:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right. The dissemination

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[21] *Avins v. Rutgers, The State University of New Jersey*, 385 F.2d 151, 153 (3d Cir. 1967), cert. denied 390 U.S. 920 (1968).

> of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[22]

Likewise in *Stanley v. Georgia* Justice Marshall stressed that "[i]t is now well established that the Constitution protects the right to receive information and ideas." These decisions make it clear that the right to hear must be considered in First Amendment cases on equal terms with the right to speak. This expanding role of the right to hear was carried further in the *United Church of Christ* case in 1966. In it the Court of Appeals for the District of Columbia Circuit held that listeners to a broadcasting station had the right to a hearing before the Federal Communications Commission on the question of whether the station's license should be renewed. The clear implication of the case is that the government has an affirmative obligation to maintain such control of the broadcasting media as will provide for the listening needs of different groups in the community. This can be accomplished, in radio and television, by assuring access to different points of view or otherwise encouraging diversity. But it also can be done, and the cases emphasizing the right-to-hear element of the First Amendment point also in that direction, through supplying government facilities for communication by individuals or groups who would not otherwise be able to use them.[23]

In addition to furnishing physical facilities the government can promote the system of freedom of expression by supplying financial resources. Government funds that enable private individuals or groups to engage in expression are being made available in many fields at the present time, probably in greater volume than is generally realized. Government grants for education and research undoubtedly make up the largest amount. There are also government subsidies for the promotion of art and entertainment projects, for legal assistance in protecting First Amendment rights, for various types of community organizations and activities under the poverty program, and for many other purposes. The most direct form of government spending in aid of expression is the allowance of tax deductions for political contributions or the free printing of position leaflets in political campaigns. In

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[22] *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), discussed in Chapter V.

[23] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), discussed in Chapter XIII; see also *Marsh v. Alabama*, 326 U.S. 501 (1946). *Office of Communication of the United Church of Christ v. F.C.C.*, 359 F.2d. 994 (D.C. Cir. 1966), noted in *Harvard Law Review*, Vol. 80 (1967), p. 670.

1967 Congress established the Corporation for Public Broadcasting, under the control of private directors, to which public funds are appropriated for development of noncommercial radio and television.[24]

Government subsidization of private expression cannot be compelled by any affirmative reading of the First Amendment. Even if the First Amendment were to be construed as imposing such a constitutional duty the courts would certainly lack the capacity to enforce or administer an obligation of that nature. Nor is the First Amendment needed as a source of power for subsidies in aid of expression. The spending power of the Federal Government and the general powers of the States are fully adequate. Moreover, there is nothing in the negative force of the First Amendment, as a general matter, that would prevent the government from using public funds to support various features of the system of freedom of expression. On the other hand the negative features of the First Amendment do impose some restrictions upon the way government funds are expended. In general these limitations would be the same as in the case of the government furnishing physical facilities: there could be no discrimination between users and no regulation of content.[25]

In the case of government subsidies, however, difficult questions arise in the practical application of these limitations. Until recently it was not clear that anyone had standing in the Federal courts to raise the First Amendment issue. Under the doctrine of *Frothingham v. Mellon* neither a taxpayer, a business enterprise suffering economic injury, nor perhaps any other potential litigant, was permitted to challenge Federal spending. This rigid rule was modified in *Flast v. Cohen,* which allowed a taxpayer to raise the question whether Federal funds were being spent in violation of the religious freedom provisions of the First Amendment. The members of the Court could not agree on a single rule, but a majority followed the principle that Federal spending can be challenged if the claim is made that the use of Federal funds contravened a specific constitutional limitation. On this theory a challenge would lie on First Amendment freedom of expression grounds. Most spending by States, and virtually all spending by municipalities, can be attacked in a taxpayer's suit. Hence the standing problem may now be disappearing.[26]

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[24] On government aid in financing political campaigns see Martin Lobel, "Federal Control of Campaign Contributions," *Minnesota Law Review*, Vol. 51 (1966), pp. 1, 50–60. In 1966 Congress passed a Presidential Election Campaign Fund Act, which would have allowed every taxpayer to designate that $1 of his tax be paid into a Presidential Election Campaign Fund, to be distributed to major political parties. 80 Stat. 1587 (1966), 26 U.S.C. §6096. Operation of the Act was later suspended. The legislation creating the Corporation for Public Broadcasting is 81 Stat. 368 (1967), 47 U.S.C. §396.

[25] It should be noted that Justice Douglas, concurring in *Cammarano v. United States*, 358 U.S. 498, 513 (1959), suggests that State subsidies for the exercise of First Amendment rights would be invalid. There seems to be no other authority for this position.

Even were this to happen, however, more serious problems persist. The rule against discrimination between different users becomes difficult to apply when potential recipients are almost unlimited in number; broad discretion must be allowed administrators, and definite proof of discrimination is beyond reach. Moreover, no precise standards are available. The Federal legislation of 1966 allowing deductions for contributions that went only to major political parties was almost certainly unconstitutional. But there still remains a question of defining "political party." And the broader issue of proportional representation in the allocation of funds to groups or individauls with minority points of view, or even individual points of view, is especially complex. Finally, the rule against regulation of content tends to break down in the case of subsidies. The government must designate the purposes for which the funds are granted, and this power inevitably brings government authority into the realm of content. As compared with the furnishing of physical facilities, which can be administered more objectively, judicial supervision over subsidies is tenuous at best.

Nevertheless it seems inevitable that government subsidizing of private expression will grow as the public sector of our national life expands and the private sector contracts. Increased government subsidization of political campaigns appears not far off. The supplying of government funds to enable various groups to utilize radio and television is likely to expand. Even government subsidies of newspapers are being seriously proposed. These developments bring obvious dangers. But they also carry enormous potential. They could lead to spectacular results: an enormous increase in the diversity of the content of the mass media, a significant growth of popular participation at the community level, and a general invigoration of the system of freedom of expression. The crucial question is whether adequate controls can be devised to make such a system work.

Such a set of controls would have to be based on the concept that the government has a political, if not constitutional, obligation to finance opposition to itself. Such a notion would have been inconceivable a generation ago. But it is gradually beginning to emerge. Its deepest roots are perhaps in the public defender and legal aid programs, which have existed for many years. The recent extension of legal assistance to the community level, through projects by which government finances many forms of litigation against itself, is a notable advance. Other features of the poverty legislation, operating despite intense hostile pressures from many quarters, have resulted in the formation of community groups that have been a major source of expression in opposition to official welfare, city planning, highway and other programs. The movement toward decentralized or community schools is also proceeding in this direction. Thus new public expectations and changed governmental attitudes are beginning to form. New institutions, such as councils of outstanding citizens comparable to the English University Grants Committee, community government at the local level, and ombudsmen, will have to be devised. New judicial doctrines to make more realistic the constitutional protections against discrimination and censorship are also necessary.

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[26] *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Flast v. Cohen*, 392 U.S. 83 (1968).

All this can be done. But in the end one must return to the proposition that great dangers inhere in this development, and that government-supported expression can never be an acceptable substitute for independently financed expression.

D. Regulation of Privately Owned Media: Radio and Television

The government can also promote the system of freedom of expression through regulation of the privately owned media of communication, with a view to expanding and enriching their output. As noted above, the greatest distortions in our system of free expression have developed in the mass media, and the efforts to eliminate these distortions have created many of the most difficult and controversial questions. The principal goals of regulation are (1) to create a greater diversity in the expression communicated by the media, and (2) to give a greater number of individuals and groups access to the media. The two objectives are of course closely related.

Government regulation along these lines has advanced furthest in radio and television. These two offer special problems. In the first place radio and television are probably the most influential media of communication in our society today. They present, on a selective basis as all communications do, not only information but ideas, attitudes, impressions and fantasies. They pervade the home, the automobile, and many public places. Secondly, radio and television are, by almost unanimous agreement, a "wasteland." The economic, political and social factors that make them so are sufficiently entrenched to discourage expectation of change on the initiative of the industry itself. Thirdly, government involvement in radio and television has always, and necessarily, been extensive. Because they are limited access media, and in any event require elaborate engineering coordination by the government, official controls have permeated the field from the beginning.

A solution of the radio and television problem might have been attempted through government ownership and control of all broadcasting facilities. This has been the approach in most other parts of the world. To the extent that a physical scarcity of facilities is involved, the First Amendment would probably not have prevented this arrangement. But serious First Amendment problems would be posed over the right of access to the media by private individuals and groups, and by the government's use of the monopoly in itself participating in the system of freedom of expression. These issues are not wholly different from those which actually have arisen and are discussed below.

In any event the United States chose, rather than government ownership and control, a different method of regulation. When the unregulated transmission of radio signals had brought about a state of chaos in the nineteen-twenties, Congress passed the Federal Radio Act of 1927 establishing a system of licensing to be administered by the Federal Radio Commission. The statutory scheme was revised and expanded by the Federal Communications Act of 1934, which still remains the basic legislation. Under the Federal Communications Act in its present form the Federal Communications Commission, successor to the earlier Commission, is empowered to grant licenses, for not more than three years but renewable, to applicants for broadcasting facilities on the basis that such grant will serve the "public interest, convenience, or necessity." Section 3(h) expressly provides that licensees shall not become "common carriers." There are specific prohibitions against obscenity, profanity and lotteries. Section 315 makes provision for "equal time" for political candidates and, as amended in 1959, requires broadcasters to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Section 326 declares that the Federal Communications Commission has no "power of censorship," nor power to interfere with "the right of free speech." These provisions are the only ones that deal directly with programs or access.[27]

The licensing system that has developed under the Federal Communications Act has several significant features. It is predicated upon the fact that there is a scarcity of physical facilities, that is, wavelengths, and that allocation of those facilities is therefore necessary. The franchise to operate a broadcasting station, often worth millions, is awarded free of charge to enterprises selected under the standard of "public interest, convenience, or necessity." Although licenses must be renewed every three years, renewals are given in all but isolated cases. The commercial sector of broadcasting, which is the dominant sector, obtains its income largely not from the listener, but from advertisers. All of this adds up to the fact that, although the broadcasting industry bears some resemblance to a traditional laissez-faire system, it has basic features that are quite different.

The main First Amendment issues grow out of the attempts by the government to regulate the media in three principal ways:

(1) Some of the controls are directed toward the character of the ownership and control of broadcasting facilities, principally with the aim of assuring independence and diversity among those who own and operate the facilities. These regulations deal with multiple ownership of stations, ownership by newspapers or other media, relation of the station to the networks, and the like. Some are concerned with the financial resources of the licensee, his relation to the community, and similar matters.

(2) Other controls are designed to achieve variety and relevance in programming. Such regulations attempt to obtain balance between different types of programs, inclusion of diverse and controversial subjects in the programs, and the presentation of varying points of view. They are incorporated in the program balance policies of the Federal Communications Commission and in the fairness doctrine.

(3) The third type of control is concerned with access to broad-

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[27] Federal Radio Act of 1927, 44 Stat. 1162 (1927); Federal Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §151 ff. The provisions forbidding obscenity, profanity and lotteries are 18 U.S.C. §§1464 and 1304. For the background of the legislation see Justice Frankfurter's opinion in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), Justice White's opinion in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), and materials referred to below.

casting facilities by individuals and groups wishing to use the medium. The main regulations of this kind are the equal time rule and the fairness doctrine.

The constitutional basis for these various controls has been a matter of high dispute. The Federal Communications Commission and the broadcasting industry have been at loggerheads, commentators have disagreed, and the courts were slow to clarify the situation. Finally, in the *Red Lion* decision in 1969 the Supreme Court came forth with a comprehensive theory.[28]

1. DEVELOPMENT OF FIRST AMENDMENT THEORY IN COURT DECISIONS

The Supreme Court had dealt with the Federal Communications Act in a significant number of cases, but until *Red Lion* it had addressed itself directly to First Amendment issues in only one—*National Broadcasting Co. v. United States*. That decision, rendered in 1943, constituted the landmark case for over twenty-five years. The specific issue involved was the validity of the F.C.C.'s Chain Broadcasting Regulations, which undertook to regulate the relations of individual broadcasting stations to the networks with a view to lessening the dependence of the single station upon the chain. The regulations were attacked upon a number of fronts, including that they constituted a violation of the First Amendment. The Supreme Court, voting five to two, upheld them. Justice Frankfurter, who wrote for the majority, dealt with the First Amendment at the end of a long opinion, saying only:

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[28] A collection of materials and references on the problem may be found in *Political and Civil Rights in the United States*, ch. VIII. Later material includes Jerome A. Barron, *op. cit. supra* note 3; Harry Kalven, Jr., "Broadcasting, Public Policy and the First Amendment," *Journal of Law and Economics*, Vol. 10 (1967), p. 15; Glen O. Robinson, "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation," *Minnesota Law Review*, Vol. 52 (1967), p. 67; Fred W. Friendly, *Due to Circumstances Beyond Our Control* (New York, Random House, 1967); Roscoe L. Barrow, "The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy," *Cincinnati Law Review*, Vol. 37 (1968), p. 447; Louis L. Jaffe, "The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change," *Cincinnati Law Review*, Vol. 37 (1968), p. 550.

We are not concerned here with the validity under the First Amendment of restrictions imposed on radio and television for the purpose of protecting social interests outside the system of freedom of expression. These matters have been discussed previously in connection with libel, privacy, obscenity and the like. See also the discussion in Robinson, *op. cit. supra*, pp. 98–111.

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[29]

Justice Frankfurter thus made clear that radio broadcasting can be regulated without infringing the First Amendment because, unlike "other modes of expression," the facilities are limited. He concluded that any regulation which met the standard of "public interest, convenience, or necessity" was "not a denial of free speech." There was, however, an exception: the Commission could not choose among applicants "on the basis of their political, economic or social views, or upon any other capricious basis." Justice Frankfurter's opinion was, to say the least, unsatisfactory. It did not explain why the scarcity factor eliminated First Amendment issues, on what theory the exception was made, why the exception was limited to applicants, or numerous other questions that lurked in the problem. Following the *National Broadcasting* case there were scattered lower Federal court opinions, upholding various actions of the Commission against First Amendment challenges, but they did little to elucidate the issue.[30]

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[29] *National Broadcasting Co. v. United States*, 319 U.S. 190, 226–227 (1943). Justices Murphy and Roberts dissented, without mentioning First Amendment issues. Justices Black and Rutledge did not participate.

147

Under these conditions wide differences of opinion on the subject persisted. The broadcasting industry clung to its position that radio broadcasting was similar to newspaper publishing and entitled to the same First Amendment protection. The F.C.C. adopted the broad view that the licensee was in effect a public trustee bound to operate its station in accordance with the public interest. It recognized First Amendment limitations, but never made very plain how or why they applied. Commentators argued for these and various other positions.[31]

The *Red Lion* decision involved two cases, each challenging aspects of the F.C.C. fairness doctrine. The fairness doctrine, in the words of Justice White's opinion, required that the "broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views." Originally a policy of the F.C.C. in applying the "public interest, convenience, or necessity" standard, the rule was written into the statute by Congress in its 1959 amendment of Section 315. One special feature of the fairness doctrine was that when a personal attack had been made in a broadcast upon a person involved in a public issue, the broadcaster must give that person an opportunity to respond. There was also a rule requiring any broadcaster who endorsed one candidate in a political editorial to offer the other candidates time to reply. The Court of Appeals for the District of Columbia had upheld the personal attack rule, but the Court of Appeals for the Seventh Circuit had invalidated regulations embodying both the personal attack rule and the political editorial rule. The Supreme Court unanimously upheld both rules.[32]

Justice White began his analysis of the First Amendment issues, as had Justice Frankfurter, with the scarcity of physical facilities for broadcasting: "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology." For this reason the government must allocate frequencies, and therefore "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." "No one has a First Amendment right to a license," he went on, "or to monopolize a radio frequency." He then explained the constitutional status of the broadcaster in the following terms:

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[30] The lower Federal court cases are summarized in the Kalven and Robinson articles, *op. cit. supra* note 28, and in Roscoe L. Barrow, "The Attainment of Balanced Program Service in Television," *Virginia Law Review*, Vol. 52 (1966), pp. 633, 644–652. See also the lower court decisions in *Red Lion*, and *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied 396 U.S. 842 (1969).

[31] The broadcasting industry's view may be found in W. Theodore Pierson, "The Need for Modification of Section 326," *Federal Communications Bar Journal*, Vol. 18 (1963), p. 15. The F.C.C.'s theories are discussed in Robinson, *op. cit. supra* note 28, pp. 142–144; Barron, *op. cit. supra* note 3, pp. 1664–1665. For Commissioner Loevinger's dissent from the F.C.C. view see Kalven, *op. cit. supra* note 28, pp. 18–19. See also the briefs in the *Red Lion* case in the Supreme Court.

[32] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 377 (1969). Justice Douglas did not participate.

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[33]

In extending the protection of the First Amendment to the broadcast situation, Justice White continued, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." He repeated: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here." The fairness doctrine, he concluded, gives effect to this First Amendment right of the public. It simply forces the licensee to share a scarce resource with "those who have a different view." Justice White completed the constitutional picture by adding that the provisions of Section 315 requiring equal time for candidates were valid on the same grounds and, reaffirming *National Broadcasting*, declared that the F.C.C. "neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."[34]

Justice White's answers to two contentions advanced by the broadcasters throw additional light on the Supreme Court's position. It had been "strenuously argued" that "if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective." To this Justice White replied that such a possibility "is at best speculative," that the "fairness doctrine in the past has had no such overall effect," and that "if the present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." Justice White also examined the contention that a scarcity of broadcast facilities no longer existed. Relying mainly on the increasing demand for competing uses of the frequency spectrum, from marine, aviation, amateur, military and common carrier users, he concluded: "Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential." [35]

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[33] 395 U.S. at 388, 389.

[34] 395 U.S. at 390, 391, 395.

The *Red Lion* decision marked an important advance in First Amendment theory concerned with affirmative promotion of the system of freedom of expression. Certain implications of the decision, and some wider perspectives on the problem, require further consideration.

2. THE THEORY OF RADIO AND TELEVISION CONTROL

In attempting to formulate a satisfactory theory of the First Amendment in its application to the regulation of radio and television two initial concepts must be given brief attention. First, it has sometimes been argued that the public as a whole "owns" the airways and the government may therefore allocate their use on such terms as are in the general interest, subject only to constitutional prohibitions against discriminatory or arbitrary action. This theory, much like the Frankfurter opinion in *National Broadcasting*, fails to come to grips with the real issues. It could equally well be said that the public "owns" the streets and parks, and that consequently individuals have no right to use them for purposes of expression except on the government's own terms. Moreover, the problem is not solved simply by bringing into the picture the doctrine of unconstitutional conditions—that if the government extends the privilege of using the airways to private individuals or groups it cannot attach conditions that violate the First Amendment. Surely the affirmative power of the First Amendment demands that the government make available for general use, as a constitutional right, the most significant medium in our whole system of freedom of expression. The government cannot maintain a monopoly of the airways any more than it can maintain a monopoly of the streets, or of printing presses. Starting from this point, then, the First Amendment issues begin to grow far more complex than the "public ownership" theory envisages.

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[35] 395 U.S. at 392–393, 399.

The second concept that needs initial clarification is the doctrine of prior restraint. On the face of it the requirement that any person obtain a license before engaging in communication by broadcasting is the baldest kind of prior restraint. The conditions for obtaining a license, moreover, go far beyond the time, place and manner regulations that have been upheld in other permit systems. Even if it is conceded, under *Times Film*, that the doctrine of prior restraint is subject to some exceptions, the Supreme Court has in ***Freedman v. Maryland*** insisted upon procedural safeguards that are totally lacking in the Federal Communications Commission licensing system. How, then, does one reconcile radio and televison licensing with the doctrine of prior restraint? The Supreme Court has ignored this problem. There would seem to be two possible answers. One is that the factor of limited facilities necessitates a modification of the prior restraint rule. The other is that public "ownership" of the airwaves justifies or requires this kind of prior restraint and that First Amendment rights are protected through other methods. These suggested answers bring us to the major issues.

There can be no doubt that the scarcity of facilities is a major consideration in the application of the First Amendment to radio and television regulation. The essential point is that the scarcity is physical, rather than economic. This condition takes radio and television out of the traditional laissez-faire system that is the basis of the First Amendment's application to the press, publishing, and other types of media. The open marketplace may control access to such media in a distorted way, but it is the traditional means of control and, while the government may attempt to expand the marketplace, it cannot totally usurp its function. In radio and television, however, the open market condition brings only physical chaos. Not everybody can be accommodated. The government, therefore, has a different function, and that function is to bring initial order into the system by regulating access to limited facilities.

When broadcasting controls were first initiated there was no question whatever that the physical facilities were in fact limited. Since that time there has been a significant expansion in available facilities, owing to the development of FM in radio, UHF in television, and CATV. Indeed, the number of radio and television stations in operation came to exceed by far the number of daily newspapers. In 1966, for example, there were 5,881 radio and 721 television stations, compared with 1,751 newspapers. Moreover, there were some frequencies, particularly UHF television channels in the lesser market areas, still unallocated. It is contended that the major factor now limiting the number of radio and television stations is not physical but economic. On the basis of these considerations the broadcasters urged in *Red Lion* that the scarcity factor can no longer serve as justification for radio and television controls different from those applicable to the press and other media.[36]

The developments just recounted, however, would not appear to change the basic scarcity factor. As Justice White argued in *Red Lion* there are growing demands from industrial, military, and other users for available frequencies. Moreover, the total number of radio and television stations operating in the country does not signify there is no longer a shortage of facilities in specific areas, particularly centers of dense population. Nor does reliance upon the total number of stations take into account the possibility of an untapped demand for diversity. Furthermore, to the extent that economic considerations restrict the number of stations now, those factors could easily change. More important than all of these considerations, however, is the fact that the scarcity of facilities should not be measured by the number of *stations* allowed to broadcast but by the number of *individuals or groups* who wish to use the facilities, or would use them if they were more readily available. The real problem is whether there is a scarcity as to potential users, not as to stations operating at a profit under present conditions. In this sense a more significant comparison would be not with the number of newspapers, but with the number of printing presses. In these terms there remains a serious scarcity and one that is likely to persist.[37]

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[36] Materials dealing with the problem of scarcity in available frequencies are cited in *Red Lion*, 395 U.S. at 397. The figures on the number of radio and television stations and newspapers are from U.S. Bureau of the Census, *Statistical Abstract of the United States* (Washington, D.C., G.P.O., 87th ed. 1966), p. 523.

[37] For the argument that no scarcity of facilities now exists see John Paul Sullivan, "Editorials and Controversy: The Broadcaster's Dilemma," *George Washington Law Review*, Vol. 32 (1964), pp.

Once it is assumed that a scarcity of broadcasting facilities exists the next question becomes, what follows from that? The question can be answered on two levels. In purely common-sense terms it would seem to follow that, if the government must choose among applicants for the same facilities, it should choose on some sensible basis. The only sensible basis is the one that best promotes the system of freedom of expression. Since a laissez-faire system does not select the users, and the government is forced to do so, it would be intolerable, and actually inconsistent with the First Amendment, for the government to choose in another way. Consequently all three kinds of regulations listed above would be valid under the First Amendment if they in fact promoted the system of freedom of expression.

The question can also be answered on a deeper level, which leads into a public agency or trustee theory. If broadcasting facilities are physically limited, then the government is obliged by the First Amendment to permit citizens to use the facilities without discrimination. This would be true whether the affirmative power of the First Amendment compelled the government to make them available, or whether the government just did so as a matter of policy. The obligation flows both from the First Amendment's right to communicate and its right to hear. Under either concept it would be a violation of the constitutional guarantee for the government to give a monopoly to any person or group. The licensee therefore can only be considered as the agent of the government, or trustee of the public, in a process of further allocation. Hence the licensee would have no direct First Amendment rights of his own, except as to his own expression. The First Amendment right would run from the individual or group seeking to engage in expression, or seeking to listen, to the government; not from the licensee (except as to his own expression) to the government. This would mean that there could be no censorship of the actual user of the facilities, but there could be controls over the licensee to assure that he made a fair allocation of the limited facilities both to users and to listeners. Only through such a system, indeed, would the requirements of the First Amendment be met.

This is essentially the position the Supreme Court reached in *Red*

719, 759. Robinson, *op. cit. supra* note 28, pp. 157–161. For the counter argument see Jerome A. Barron, "In Defense of 'Fairness': A First Amendment Rationale for Broadcasting's 'Fairness Doctrine,'" *University of Colorado Law Review*, Vol. 37 (1964), pp. 31, 39–41. Professor Kalven seems to accept the scarcity theory. See Kalven, *op. cit. supra* note 28, pp. 34, 37. The issue is of course, at least temporarily, disposed of by *Red Lion*.

Lion. Justice White found the force of the First Amendment to lie in the right of the public to hear, and he ignored the right of the ordinary citizen to use broadcasting facilities to speak. But he did conclude that the broadcaster had only the First Amendment rights of a "proxy or fiduciary," with an obligation "to present those views and voices which are representative of his community." [38]

Along either path from the physical scarcity factor, it is necessary to proceed further and to outline, at least in a general way, the kinds of limitation which the First Amendment would impose upon government operation of such a licensing system. The *Red Lion* decision did not move very far in this direction. It found the fairness doctrine a reasonable method of sharing a scarce resource, and it brushed off as "speculative" the broadcasters' contention that the fairness doctrine would result in reduced coverage of controversial issues. But it did not pursue the questions further.

The basic issue would be whether the government control "abridged" freedom of expression. It might do so in at least two ways:

(1) The regulations might, as a substantive matter, diminish rather than expand the amount of expression, lessen rather than increase diversity, or in similar respects harm rather than promote the system of freedom of expression. The broadcasters made this claim in *Red Lion*. Such a judgment would at times be difficult to make, or for a court to document. But it should be noted that the issue is not the broad one of whether in an abstract way the product of the system is "better" on some particular scale of values. The government cannot control the content of individual expression, or normally try to purify the system, or favor one person over another. Its powers are limited to removing obstructions in the system. It therefore must confine itself to increasing the number of participants in the system, enlarging the diversity of the expression, or removing obstacles to effective working of the system. All this must be carried out, of course, in light of the basic functions of the system.

(2) The regulations might, as an administrative matter, operate to smother freedom of expression through the power of surveillance, threats of informal sanction, or other form of harassment available to government officials because of the regulatory mechanism. This kind

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[38] The Court's position was not greatly different from that taken by the F.C.C., but the Commission had never spelled it out or accepted its implications. See also Barron, *op. cit. supra* note 37, pp. 43–45, and *op. cit. supra* note 3, pp. 1663–1665.

of limitation is likewise hard to measure. The government presence is always inhibiting. The courts would probably find it unduly repressive only in exceptional circumstances. It remains a meaningful limitation, however, and in the course of time might be given more specific content. In general, like the doctrine of *Freedman v. Maryland*, it would give the courts supervisory power over the practical details of administering the controls.[39]

Quite apart from the scarcity factor in radio and television facilities, it is possible to fashion a theory of control out of affirmative concepts of the First Amendment. The regulations we are here concerned with are not those designed to restrict expression on behalf of other social interests. They are intended to promote the system of free expression through encouraging wider participation by those who wish to communicate and greater diversity for those who wish to hear. In general the affirmative features of the First Amendment would permit this. The ordinary negative limits of the First Amendment, as applied to government restrictions seeking to safeguard other social interests, would not be relevant. Rather, in this context the negative limitations —the measure of "abridge"—would be those just set forth as controlling when the government power was based on the scarcity theory.

Such a doctrine of First Amendment power and limitation is far-reaching and entails obvious dangers. Applied to the press, for example, it might authorize controls over newspaper coverage that would be highly questionable. In the area of radio and television, however, the government is already heavily involved with the task of preventing electrical interference and solving similar engineering problems. Thus the regulations have a different substantive and administrative impact and would not necessarily constitute an abridgment of free expression in the same way as comparable regulations in other areas not already heavily weighted by government controls.

The application of these principles, whether derived from the scarcity factor theory or the pure affirmative theory, would involve detailed and complex factual judgments. Regulations in the first category—those directed towards the character of ownership and control by licensees—would probably have the least difficulty in passing First Amendment muster. A regulation limiting the number of stations one enterprise may own, or forbidding ownership of a broadcasting station by a newspaper, or forbidding a network to compel an affiliate station to carry all network programs, is appropriate to assure the independence of the licensee and thereby promote diversity. In most respects these forms of control are not different from those exercised through the anti-trust laws, whose application to the mass media was upheld in *Associated Press v. United States*. Likewise, the financial resources of the licensee, his support by various groups in the community, and his personal character are relevant to his function as public agent or trustee, though not relevant to the exercise of his own right of expression through the use of radio and television facilities. Unless it appeared that some substantive impact of the regulation or some feature of its administration burdened rather than enlarged the system of freedom of expression the regulation would be immune to attack under the First Amendment.[40]

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[39] *Freedman v. Maryland*, 380 U.S. 51 (1965), discussed in Chapter XIII.

Regulations of the Federal Communications Commission designed to assure program balance would also, as a general proposition, not violate any mandate of the First Amendment. Such regulations require that a licensee present programs falling into different categories, such as news, education, politics, local talent, entertainment and the like. They are essential to assure that the licensee is carrying out his obligation as public trustee to secure the First Amendment rights of the listening public to hear. The distinction the Federal Communications Commission makes between a requirement that the licensee broadcast programs within its general categories, and control over the contents of a particular program, conforms exactly to the theory that the government can take measures to expand the variety of expression but may not censor the actual expression itself. There may be a close question as to whether any given action by the F.C.C. does in fact promote diversity, or whether in the context of a particular situation specialization on the part of one station might not serve the purpose better. Within such limitations, however, the F.C.C. is not abridging freedom of speech.

The most difficult problems arise when the government attempts to introduce greater diversity, particularly by compelling a licensee to present varied points of view on controversial issues, or by forcing him to grant access to persons whose interests are affected by a broadcast. These efforts are presently confined to the fairness doctrine and the equal time provision, but they could be greatly expanded. In general regulations of this nature add to the number of participants, increase diversity, and eliminate discrimination in the use of broadcast facilities, without controlling the content of the expression. They are therefore prima facie justified under the First Amendment. Serious questions may arise, however, when the limiting conditions prescribed by the First Amendment are applied in this area. The controls may in fact operate to reduce the amount of controversial discussion, at least as the broadcasting industry is now structured, and they provide the basis for intensive informal influence of government officials on private expression. Particularly difficult issues arise in according fair representation to minority or even individual points of view. But they cannot be avoided; ignoring them is a greater violation of the First Amendment than a rough but practical solution. On all such matters the judicial judgment under the First Amendment must turn largely on the circumstances of the particular case.

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[40] *Associated Press v. United States*, 326 U.S. 1 (1945). The chain broadcasting regulations were, of course, upheld in *National Broadcasting Co. v. United States*, discussed *supra*.

All in all, the fundamental principles that govern the control of radio and television are not too hard to formulate. *Red Lion* has laid a firm foundation. If the possibilities now opened up are exploited the implementation of those principles will pose more difficult problems. Nevertheless the guiding doctrines are available. Whether as a practical matter broadcasting facilities will ever be available on a wide scale to minority groups and people without funds is, of course, another question.

E. Regulation of Privately Owned Media: The Press

Government regulation designed to promote the system of freedom of expression takes on quite a different cast when it is applied to media of communication other than radio and television. Of the other principal mass media, the motion picture industry has received little attention. The anti-trust laws are applicable to motion picture production, distribution, and exhibition, but beyond this there has been no significant regulation and no obvious need for controls. We are therefore concerned here primarily with the press, consisting of newspapers, magazines, books, and other forms of publishing.

It is at once apparent that the basic conditions surrounding the press are unlike those prevailing in radio and television. There are no technical attributes of the press that require engineering coordination and no scarcity of physical facilities that demands allocation among potential users. Traditionally the press has operated in the classic laissez-faire pattern. In some areas, particularly newspaper publishing, economic factors have seriously curtailed the number of participants. Even so, there are no characteristics inherent in the medium that imperatively demand government regulation. Moreover, the fact that the government is by necessity so heavily involved in radio and television, with all the dangers implicit in that situation, makes it important for the balance of the total system of expression that the press remain relatively free of government controls. Hence, in the case of the press, the doctrines limiting governmental efforts to promote the system apply with much greater force. In terms of substantive impact, the government regulation is much less likely to promote the system. In terms of administrative impact, the government regulation is much more likely to be repressive.

There is one type of government control that has long been applied to the press and has raised little question under the First Amendment. This is anti-trust legislation, designed to eliminate monopoly and increase diversity in the medium. The validity of anti-trust controls was sharply challenged in *Associated Press v. United States*, decided in 1945. In that case the government suit attacked practices of the Associated Press which imposed serious restrictions upon a newspaper wishing to use its services if the newspaper competed with other papers that were already members of Associated Press. In reply to the argument that the First Amendment prohibited the application of anti-trust legislation to the press, Justice Black made what, at least until *Red Lion*, has been the leading statement from the Court in support of the affirmative aspects of the First Amendment:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means

> freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[41]

The anti-trust laws have, as a practical matter, had little effect in preventing a drastic decline in the number of newspapers, or in otherwise promoting diversification in the press. Recently legislative proposals have tended to take a different tack. The Failing Newspaper Bill, advanced as a partial solution to the problem of a declining press, would allow some consolidation of economic resources where necessary to keep at least one newspaper alive. There would seem to be no serious First Amendment objection to this form of legislation either. As long as the government regulation in fact promoted diversity in the press, and did not choke the press under a mass of administrative regulation, the First Amendment would not proscribe such an attempt to encourage a more vital role for that medium.

Much more far-reaching proposals have recently been made for regulation of the press, aimed at compelling newspapers to give space in their columns for a right of reply, at airing of controversial issues now ignored, and for expression of viewpoints rarely represented. In an article in 1967 that has received wide attention Professor Jerome Barron argued that "at some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis to representative groups in the community." Such a right of access, he suggested, could be imposed either by judicial action or by legislative provision, and would extend to all material ordinarily "suppressed and underrepresented by the newspaper." The following year, at its biennial convention, the American Civil Liberties Union voted to move cautiously in the direction proposed by Professor Barron.[42]

In analyzing the First Amendment issues involved in such propositions it is first necessary to define more carefully the type of matter the newspaper might be required to publish and the manner in which the regulation would be administered. Various categories of material can be envisaged. First the newspaper might be required to accept paid noncommercial advertisements, on roughly the same basis as it accepts commercial advertisements, in which controversial issues could be discussed or minority views expressed. Secondly, the newspaper might be compelled to grant roughly equal space in its columns to any person who has been libeled or personally attacked in order that he may make a reply. Thirdly, the newspaper might be made to open its letters-to-the-editor columns or make other space available for statements by individuals or groups on issues not reported or on viewpoints not represented by the paper. Finally, a kind of "fairness doctrine," similar to that employed in radio and television, could be imposed on newspapers, requiring them to provide on their own motion for coverage of all "newsworthy" subject matter and expression of all "responsible" viewpoints. There are other possibilities, of course, but these seem to present the main issues.

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[41] *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See also *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

[42] Barron, *op. cit. supra* note 3, p. 1666. Professor Barron summarizes the case law on the subject and notes that there are no decisions thus far which require a newspaper to grant a right of access. *Ibid.* pp. 1667–1671. The A.C.L.U. National Board later declined to implement the convention resolution.

The right of reply to libelous matter, and perhaps the right to buy noncommercial advertising space, could be imposed by judicial action, were a court disposed to do so. The other rights of access would almost certainly have to be established in the first instance by legislative action. More important for First Amendment purposes, however, would be the nature of the administrative machinery necessary to enforce the various kinds of controls effectively. The first two categories —the noncommercial advertisements and the reply to libel or personal attack—could be phrased in precise terms and readily administered through the usual forms of judicial process, *i.e.*, by injunction or criminal process. The obligation to print statements, on the other hand, would raise intricate problems of whether certain issues had been properly covered, whether all points of view had been presented, whether a particular person or group was representative, whether a specific viewpoint was responsible, "crackpot," or irrelevant, and many like issues. The "fairness doctrine" would be even more complex to administer. It is likely that these two latter categories could be enforced, if at all, only through some form of administrative tribunal.

If we apply to this situation the two tests set forth above, which limit the power of government to promote the system of freedom of expression by control of the mass media, the first two forms of regulation might be found valid and the second two invalid under the First Amendment. In their substantive impact the first two regulations would increase the number of participants in the system and produce greater diversity; they would not seem to entail any serious adverse effect upon the newspaper. The latter two forms of regulation would also add to the number of participants and provide more diversity, but they would reduce by an equal amount the volume and kind of expression the newspaper itself sought to promulgate. These substantive factors might not point clearly in any one direction. But the administrative impact would appear persuasive. The first two forms of regulation are narrow, objective, and readily enforced. The two latter would require an immense administrative apparatus that would seriously threaten the independence of the medium.[43]

We conclude, then, that the kinds of regulation acceptable, indeed unavoidable, in radio and television are unacceptable, indeed unconstitutional, as applied to the press. A limited right of access to the press can be safely enforced. But any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity. Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action. Such a goal cannot be reached by mere enforcement of the antitrust laws. It will undoubtedly be necessary to go to the economic roots of the problem and either by government subsidies or other devices create an open market with a new form of economic base.

F. Supplying the Raw Materials and Improving the Skills Necessary for Achieving an Effective System

An effective system of freedom of expression depends upon an abundance of raw materials feeding into the system, in the form of information, ideas, and alternative solutions; and upon the development of skills for utilizing those raw materials, in the form of ability to understand, appraise, and create. This is especially true of the system's function as a mechanism for the solution of political and social problems. The government can probably do more to vitalize the system by supplying raw materials and improving the skills with which they are employed than by any other form of promotion. At one time it may have been thought sufficient for the government to furnish an occasional public library and a one-room schoolhouse. But that degree of involvement is inadequate for a modern technological society. It is necessary that conscious attention be given to the role of the government in supporting the system at these critical points.

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[43] See the discussion of these problems in Chafee, *op. cit. supra* note 3, pp. 624–650.

161

To some extent, of course, the input of raw materials in the system has expanded in modern times. New media of communication and improvements in the old have made more information more readily and rapidly available. The development of television has added a new dimension. Likewise the scholarly production of educational and research institutions has grown rapidly, as has the supply of information and opinion from other sources. Nevertheless, there have been countervailing forces at work. The growing complexity of the issues has meant that more information must be made available if the citizen is to have some rational basis for judgment. The growth of the government bureaucracy has resulted in the concentration of more critical information in the control of institutions that inherently tend to operate within their own framework and to shut the public out.

Not very much has been done to meet these problems. The government has increased its own participation in the system, but that is not an unmitigated advantage. The single most promising development has probably been the enactment of right-to-know laws. These, including the Moss Act passed by Congress in 1966, require government agencies to make certain types of information about their operations public. Thus far the laws have been weak and easily evaded. Furthermore, neither the communication media nor private citizens have pressed very hard to take advantage of them. The right-to-know laws nevertheless stand as an example of the kind of measure that can be devised to enlarge and enrich the flow of material into the system.[44]

[44] The Moss Act is 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. 552. On the right-to-know problem, see Harold L. Cross, *The People's Right to Know* (New York, Columbia University Press, 1953, Supp. 1959); Wiggins, *op. cit. supra* note 1; Note, "Open Meeting Statutes: The Press Fights for the 'Right to Know,'" *Harvard Law Review*, Vol. 75 (1962), p. 1199. Note, "Freedom of Information: The Statute and the Regulations," *Georgetown Law Journal*, Vol. 56 (1967), p. 18; Kenneth C. Davis, "The Information Act: A Preliminary Analysis," *University of Chicago Law Review*, Vol. 34 (1967), p. 761; Note, "The Freedom of Information Act: Access to Law," *Fordham Law Review*, Vol. 36 (1968), p. 765.

With respect to the improvement of the skills needed to assimilate and use the raw materials provided by the system, there have also been some advances. Thus the illiteracy rate is low and the number of students in our institutions of higher learning is at an all-time high. It is here, however, that the glaring defects in our educational system are most disturbing. The incredibly low standards of education in many of our elementary and secondary schools, and the bland and conformist character of much of our higher education, hardly equip our citizens with the interest, understanding, independence and maturity that are essential to a healthy system of freedom of expression.

No First Amendment problems would arise from the use of legislative power to enrich the flow of materials into the system or to sharpen the skills with which the material is used. Adequate power resides in government for these purposes and the negative limitations of the First Amendment could easily be satisfied. More intriguing questions emerge, however, if one speculates about the power of the courts to employ the First Amendment affirmatively to achieve certain immediate objectives along the lines suggested. It might well be argued, for instance, that the positive demands of the First Amendment would require the government to make public certain types of information necessary for public decision making. It might even be that certain practices of the public school or university, most obviously detrimental to achieving the objectives of the First Amendment, could be remedied by judicial decree. The courts would, of course, be faced with all the difficulties stemming from lack of power, money and administrative techniques that are presented by attempts to administer an economic and social bill of rights through the judicial process. Furthermore, they would have to operate within the principles of academic freedom. It is not inconceivable, however, that First Amendment doctrine may begin to move in this direction.

The Power of the FCC To Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification[*]

Who art thou that judgest another man's
servant? To his own master he standeth or falleth.
Romans 14:4

I. Introduction

The degree of concentration of ownership and control of the mass communications media has been the subject of intense debate in recent years.[1] In February 1975, the Federal Communications Commission (FCC),[2] which is vested with the responsibility of regulating the broadcast media[3] to promote the public interest,[4] responded to this issue by adopting its Second Report and Order.[5] In the Second Report and Order, which was announced after several years of rulemaking activity[6] that aroused considerable interest among

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[*] The power of the FCC to regulate newspaper-broadcast cross-ownership: the need for congressional clarification in Michigan Law Review, vol. 75, August 1977: 1708–1731. Reprinted with permission of the Michigan Law Review Association, Ann Arbor, Michigan. 48109. Copyright 1977.

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[1] *See, e.g.*, *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 2328-29 (1968); B. Schmidt, Freedom of the Press Vs. Public Access 37-46 (1976); Johnson & Hoak, *Media Concentration: Some Observations on the United States' Experience*, 56 Iowa L. Rev. 267 (1970). That control of the communications media is highly concentrated is evidenced by the growth of chain newspapers and chain broadcasting, a decrease in the number of communities with separately owned newspapers, and the increasing instances of cross-ownership. Comment, *Concentration of Ownership of the Media of Mass Communication: An Examination of New FCC Rules on Cross Ownerships of Co-located Newspapers and Broadcast Stations*, 24 Emory L.J. 1121, 1121-23 (1975).

[2] In this Note, the Federal Communications Commission is referred to variously as the "FCC" or as the "Commission."

[3] The broadcast media consists of television (UHF and VHF) and radio (AM and FM).

[4] *See* Communications Act of 1934, § 303, 47 U.S.C. § 303 (1970 & Supp. V 1975).

[5] Amendment of §§ 74.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order (Docket No. 18110), 50 F.C.C.2d 1046 (1975) [hereinafter cited as Second Report & Order], *affirmed in part, vacated in part, and remanded*, National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

[6] *See, e.g.*, Notice of Proposed Rule Making, 33 Fed. Reg. 5315 (1968) (proposed rules prohibiting common ownership of broadcast stations in different broadcast services within the same market); Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970) ("one-to-a-customer" rules prohibiting common ownership of VHF-TV stations and radio stations in the same market, allowing ownership of AM-FM radio combinations in one market but severely limiting the creation of such combinations, and leaving the issue of common ownership of UHF-TV stations and radio stations in the same

governmental officials and the media,[7] the Commission amended its rules concerning multiple ownership of broadcast stations[8] so that an owner[9] of a daily newspaper[10] could not acquire a license to operate a broadcast station in the same market[11] where the newspaper is published.[12] The amendments also required a broadcast licensee

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market to be decided on a case-by-case basis); Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 F.C.C. 2d 339 (1970) (proposed prohibition of ownership, operation, or control of co-located broadcast outlets by newspapers, in order to limit ownership in any market to one or more daily newspapers, one television station, or one AM-FM radio combination). *See also* Comment, *Media Cross-Ownership—The FCC's Inadequate Response*, 54 TEXAS L. REV. 336, 337-42 (1976).

Prior to 1968, FCC "duopoly" rules prohibited common ownership in a single market of more than one FM radio station, Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940), more than one AM radio station, Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943), or more than one television station, Rules Applicable to Stations Engaged in Chain Broadcasting, 6 Fed. Reg. 2282, 2284-85 (1941). These rules were amended by both the First and the Second Report and Order and are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976). Several further amendments to these rules have been made. *See* Multiple Ownership of Standard, FM and Television Broadcast Stations, 42 Fed. Reg. 16145, 16148 (1977).

[7] *See* Second Report & Order, *supra* note 5, at 1046-48. For a list of parties filing comments and reply comments in response to the Further Notice of Proposed Rulemaking, *supra* note 6, see Second Report & Order, *supra* note 5, app. A, at 1090-92. This activity also generated considerable legal commentary. *See* Mills, Moynahan, Perlini & McClure, *The Constitutional Considerations of Multiple Media Ownership Regulation by the Federal Communications Commission*, 24 AM. U.L. REV. 1217 (1975); Comment, *supra* note 1; Comment, *supra* note 6; Comment, *A Primer on Docket Number 18110: The New FCC Cross-Ownership Rules*, 59 MARQ. L. REV. 584 (1976); Note, *Diversity Ownership in Broadcasting: Affirmative Policy in Search of an Author*, 27 U. FLA. L. REV. 502 (1975).

[8] 47 C.F.R. §§ 73.35 (AM Radio), 73.240 (FM radio), 73.636 (television) (1976), *as amended by* Multiple Ownership of Standard, FM and Television Broadcast Stations, 42 Fed. Reg. 16145, 16148 (1977).

[9] The term "owner" refers to anyone who "directly or indirectly owns, operates, or controls." *See* 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1976); Second Report & Order, *supra* note 5, at 1099, 1101, 1103. The definition of "control" is "not limited to majority stock ownership, but includes actual working control in whatever manner exercised." 47 C.F.R. §§ 73.35 Note 1, 73.240 Note 1, 73.636 Note 1 (1976); Second Report & Order, *supra* note 5, at 1099, 1102, 1104.

[10] "[A] daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication." 47 C.F.R. §§ 73.35 Note 10, 73.240 Note 10, 73.636 Note 10 (1976); Second Report & Order, *supra* note 5, at 1101, 1103, 1106.

[11] Broadcast stations and newspapers are in the same market if they serve the same service area, defined by reference to a broadcast facility's ground wave contours. Thus, if the 2 mV/m contour of an AM station, the 1 mV/m contour of an FM station, or the Grade A contour of a television station completely encompasses the community in which the newspaper is published, the broadcast station and the newspaper are in the same market. A radio or television station meeting one of these standards is said to have a "city-grade signal." Second Report & Order, *supra* note 5, at 1106-07.

[12] In effect, the amendments preclude all applications by daily newspaper pub-

who subsequently acquires a co-located newspaper to divest one of the two properties within one year or before the expiration of his license, whichever period is longer.[13] In addition, the FCC ordered the divestiture of newspaper-broadcast combinations in sixteen small markets[14] where the publisher of the only daily newspaper also directly or indirectly owned, operated, or controlled the only radio or television station.[15] Existing newspaper-broadcast combinations not ordered to divest were not affected by the rules unless subsequently sold, in which case the newspaper and the broadcast station must be sold to different parties.[16]

The Second Report and Order was appealed both by parties who argued that the FCC lacked the statutory and constitutional authority to promulgate newspaper-broadcast cross-ownership rules and by parties who believed that the rules did not go far enough.[17] On March 1, 1977, the Court of Appeals for the District of Columbia Circuit, in *National Citizens Committee for Broadcasting (NCCB) v. FCC*,[18] affirmed those rules forbidding the future formation or transfer of co-located newspaper-broadcast combinations but vacated the rules affecting existing combinations, holding that there should be a presumption favoring divestiture.[19] The court viewed divestiture as the "most promising method for increasing diversity that does not entail governmental supervision of speech."[20] Thus, with re-

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lishers for new co-located broadcast stations as well as requests for FCC consent to the sale or transfer of existing stations where the buyer or transferee owns a local daily newspaper. Thus, the rules ban the formation of any new broadcast-newspaper combinations in the same market.

[13] *Id.* at 1107.

[14] The markets were Anniston, Alabama; Hope, Arkansas; Albany, Georgia; Effingham, Illinois; Macomb, Illinois; Mason City, Iowa; Arkansas City, Kansas; Owosso, Michigan; Meridian, Mississippi; Norfolk, Nebraska; Watertown, New York; Findlay, Ohio; DuBois, Pennsylvania; Texarkana, Texas; Bluefield, West Virginia; and Janesville, Wisconsin. *Id.* at 1098 apps. D & E.

The new rules required divestiture by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only radio or television station(s) placing a city-grade signal over the entire community in daytime hours are under common ownership. The owner of the combination must divest either the newspaper or the broadcast station. Waivers may be granted on proper showing. *Id.* at 1106. Pursuant to this rule, nine newspaper-radio and seven newspaper-television combinations were ordered broken up before January 1, 1980. *Id.* at 1098.

[15] *See* 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976), *as amended by* Multiple Ownership of Standard, FM and Television Broadcast Stations, 42 Fed. Reg. 16145, 16148 (1977); Second Report & Order, *supra* note 5, at 1099-104.

[16] Second Report & Order, *supra* note 5, at 1107.

[17] *See* BROADCASTING, Feb. 10, 1975, at 70.

[18] 555 F.2d 938 (D.C. Cir. 1977).

[19] Prior to the decision in *NCCB*, the FCC reconsidered its rules concerning multiple ownership of broadcast stations and newspapers but did not materially alter them. 53 F.C.C.2d 589 (1975).

[20] 555 F.2d at 965.

spect to the retroactive aspects of the rule, Chief Judge Bazelon's opinion for the court concluded:

> The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. . . . [We] believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.[21]

The United States Supreme Court recently granted certiorari in *NCCB*.[22]

The controversy surrounding the FCC's Second Report and Order, its appeal, and the subsequent decision in *NCCB* raises basic questions concerning the statutory authority of the FCC to promulgate rules concerning newspaper-broadcast cross-ownership. This Note suggests that the FCC, notwithstanding judicial affirmation in *NCCB* of the Commission's authority to adopt such rules, might well be exercising more authority than Congress intended it to possess under the Communications Act of 1934.[23] This Note therefore concludes that, irrespective of the merits of the Second Report and Order, Congress should reexamine and clarify the scope of the FCC's power in this regard.

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[21] 555 F.2d at 966. This ruling would force the breaking up of over 50 newspaper-television station combinations and 120 newspaper-radio station combinations. N.Y. Times, Oct. 4, 1977, at 25, col. 1

[22] 46 U.S.L.W. 3179-82 (U.S. Oct. 3, 1977). In so ruling, the Court consolidated six petitions for certiorari rising out of the *NCCB* decision: FCC v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3179 (U.S. Oct. 3, 1977) (No. 76-1471); Channel Two Television Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3179 (U.S. Oct. 3, 1977) (No. 76-1521); National Assn. of Broadcasters v. FCC, *cert. granted*, 45 U.S.L.W. 3180 (U.S. Oct. 3, 1977) (No. 76-1595); American Newspaper Publishers Assn. v. National Citizens Comm. for Broadcasting, *cert. granted*, 45 U.S.L.W. 3180 (U.S. Oct. 3, 1977) (No. 76-1604); Illinois Broadcasting Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3181 (U.S. Oct. 3, 1977) (No. 76-1624); The Post Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3181 (U.S. Oct. 3, 1977) (No. 76-1685).

[23] 47 U.S.C. §§ 151-609 (1970 & Supp. V 1975). The Supreme Court may address this issue in its review of *NCCB*, even though only two of the successful petitions for certiorari in the case, *see* note 22 *supra*, raised the issue of the FCC's statutory authority to adopt newspaper-broadcast cross-ownership rules under the Communications Act of 1934: American Newspaper Publishers Assn. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3180 (U.S. Oct. 3, 1977) (No. 76-1604); National Assn. of Broadcasters v. FCC, *cert. granted*, 46 U.S.L.W. 3180 (U.S. Oct. 3, 1977) (No. 76-1595). Several other successful petitions for certiorari questioned whether the Act *requires* the ordering of divestiture: The Post Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3181 (U.S. Oct. 3, 1977); Illinois Broadcasting Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3181 (U.S. Oct. 3, 1977); Channel Two Television Co. v. National Citizens Comm. for Broadcasting, *cert. granted*, 46 U.S.L.W. 3179 (U.S. Oct. 3, 1977).

The petitions for certiorari appear most concerned with the issue of whether the *NCCB* court exceeded its proper reviewing role.

II. THE FCC'S PURPORTED RULEMAKING AUTHORITY FOR REGULATION OF NEWSPAPER-BROADCAST CROSS-OWNERSHIP

In the Second Report and Order, the FCC claimed authority to adopt rules prohibiting cross-ownership of newspapers and broadcast stations in the same market area pursuant to its "long standing policy of promoting diversification of ownership of the electronic mass communications media."[24] Although it did not cite any statute that specifically authorized the adoption of rules prohibiting newspaper owners from acquiring broadcast licenses, the Commission claimed that it derived general rulemaking authority from several provisions of the Communications Act, including section 4(i), which provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions,"[25] and section 303(r), which states that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations, and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."[26] In addition, the Commission found statutory authority for promoting diversification in its mandate to grant licenses in the public interest.[27] In this regard it cited section 309(a) of the Communications Act, which provides that

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[24] Second Report & Order, *supra* note 5, at 1048. The FCC, citing Associated Press v. United States, 326 U.S. 1 (1945), *aff'g*. 52 F. Supp. 362 (S.D.N.Y. 1943), claimed that its diversification policy is derived from both the first amendment and antitrust law. In the district court opinion for Associated Press, Judge Learned Hand, in holding that certain bylaws of the Associated Press violated the antitrust laws because they restricted access to news, stated that

> one of the most vital of all general interests [is] the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

Associated Press v. United States, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) The Supreme Court affirmed the district court's opinion, stating that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." 326 U.S. at 20. *See generally* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 270-83 (D.C. Cir. 1974) (Bazelon, C.J., concurring); Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COM. B.J. 1 (1974).

Although it noted that newspaper-broadcast cross-ownership rules are supported principally by first amendment considerations, the FCC in the Second Report & Order also cited antitrust policy "as a correlative source of authority for [a] diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices." 50 F.C.C.2d at 1049. Even though the Supreme Court has held that the FCC is not empowered to decide antitrust issues, United States v. Radio Corp. of America, 358 U.S. 334 (1959), antitrust policy may be considered by the Commission in its determination of whether the public interest standard will be met in a particular situation. 358 U.S. at 351. In this regard, the Court has declared that

> in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communications.

358 U.S. at 351-52. *See also* Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U.L. REV. 159 (1971).

[25] 47 U.S.C. § 154(i) (1970).

> the Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.[28]

Since the Communications Act gives the FCC the power to promulgate rules and appears to authorize the promotion of the policy of diversification of ownership, the FCC concluded in the Second Report and Order that it possesses the statutory authority to regulate newspaper-broadcast cross-ownership through rulemaking.

Although the Communications Act authorizes the FCC to grant or to deny a license to an individual in an ad hoc proceeding, the statute does not explicitly empower the Commission to make rules that prevent a particular class of applicants from acquiring broadcast licenses. It is clear from the Act that the FCC must regulate the broadcast media in a manner that promotes the public interest;[29] indeed, this standard has emerged as "the touchstone for the exercise of the Commission's authority."[30] Moreover, the long-standing policy of promoting diversification of ownership of the broadcast communications media, which was cited by the Commission as the principal justification for the Second Report and Order,[31] has been deemed to be an important element of the public interest by both the Commission and the courts.[32] However, section 309(a),[33] the provision governing the procedure for granting broadcast licenses, allows the Commission to allocate licenses only by considering the public interest on a case-by-case basis in the context of each license application. Although courts have upheld FCC efforts to promote diversification in comparative ad hoc proceedings, in which the Commission must choose between two or more applicants for the same license,[34] section 309(a) neither authorizes nor expressly prohibits the Commission from adopting rules that prevent an entire class of applicants from acquiring broadcast licenses.

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[26] 47 U.S.C. § 303(r) (1970).

[27] *See* Second Report & Order, *supra* note 5, at 1048.

[28] 47 U.S.C. § 309(a) (1970).

[29] The statutory standard of "public interest, convenience, and necessity" is typically referred to as the "public interest." *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940). The term "public interest," according to the Commission, encompasses many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." Second Report & Order, *supra* note 5, at 1048 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[30] FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[31] Second Report & Order, *supra* note 5, at 1048.

[32] *See* Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955). *See also* Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951).

[33] 47 U.S.C. § 309(a) (1970).

III. *Storer*: JUDICIAL APPROVAL OF PROMOTING DIVERSIFIED OWNERSHIP

In *United States v. Storer Broadcasting Co.*,[35] the Supreme Court confronted the ambiguity of section 309(a) and recognized the authority of the FCC to promote diversified ownership through rulemaking proceedings. In *Storer*, the petitioner challenged FCC multiple-ownership rules that prohibited broadcast licensees from acquiring more than a certain number of stations.[36] Storer had earlier convinced the Court of Appeals for the District of Columbia[37] that these rules emasculated section 309 of the Communications Act by denying Storer's application for a new television station without an ad hoc hearing in which the company would have the opportunity to demonstrate that the acquisition of an additional station would not impair the public interest.[38] The court of appeals stated:

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[34] *See, e.g.*, Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). In this case, Scripps-Howard owned one newspaper in Cleveland, where five AM radio stations and two daily newspapers existed entirely independent of Scripps-Howard control. Scripps-Howard was denied a broadcast license by the FCC, and the Court of Appeals for the District of Columbia, in upholding the FCC's denial, stated:

> In considering the public interest the Commission is well within the law when, in choosing between two applicants, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected. . . . This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news. . . . But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity.

189 F.2d at 683.

[35] 351 U.S. 192 (1956).

[36] *See* "duopoly" rules cited in note 6 *supra*. In 1953, these rules limited a licensee to one station within a service area and to a total of seven AM, seven FM, and five television stations. They also provided that ownership of 1% or more of the voting stock of a broadcast corporation would be considered equivalent to ownership, operation, or control of the station. When Storer applied to the FCC for licensing of a new television station in 1953, it was already licensed to own and operate three television stations, and its wholly owned subsidiaries were licensed to own and operate two more. In light of these facts, the FCC dismissed Storer's application as being inconsistent with the multiple-ownership rules. *See* Storer Broadcasting Co. v. United States, 220 F.2d 204, 205-06 (D.C. Cir. 1955), *revd.*, 351 U.S. 192 (1956).

[37] 220 F.2d 204 (D.C. Cir. 1955), *revd.*, 351 U.S. 192 (1956).

> [T]he Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.[39]

In effect, the court of appeals concluded that whether a particular degree of concentration of control is compatible with the public interest is a matter that must be determined on a case-by-case basis with consideration of all of the factors embraced by the public interest standard. Thus, it held that the arbitrary limits imposed by the multiple-ownership rules were inconsistent with the hearing provisions of section 309(b).[40]

On appeal the Supreme Court reversed,[41] holding that the multiple-ownership rules were consistent with the powers accorded the FCC by the Communications Act. The Court noted that "[t]he challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking powers not inconsistent with the Act or law."[42] Unlike the lower court, it did not read section 309 as a limitation upon the Commission's rulemaking authority. Instead, the Court stated that Congress intended the Communications Act "to assure fair opportunity for open competition" in broadcasting[43] and that section 309(b) should not be interpreted to bar "rules that declare a present intent to limit the number of stations consistent with a permissible 'concentration of control.'"[44] The Court said that the multiple-ownership rules simply "announce[d] the Commission's attitude on

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38. *See* 220 F.2d at 209.

39. 220 F.2d at 208 (footnote omitted).

40. *See* 220 F.2d at 209. In 1960, the hearing provision was moved from § 309(b) to § 309(e). Act of Sept. 13, 1960, Pub. L. No. 86-752, 74 Stat. 889, 891 (codified at 47 U.S.C. § 309(e) (1970)); *see* Citizens Communications Center v. FCC, 447 F.2d 1201, 1203 n.4 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972). Section 309(e) provides that a hearing must be held if a substantial and material question of fact arises in any application to which § 309(a) applies or if the Commission is unable to make a finding from the application alone of whether the public interest, convenience, and necessity would be served by granting the application.

41. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

42. 351 U.S. at 202-03.

43. 351 U.S. at 203.

44. 351 U.S. at 203.

public protection against such concentration,'"[45] and the Court was willing to defer to the FCC's judgment on this matter.[46]

In response to the argument found crucial by the court of appeals—that the rules limited the Commission's consideration of the public interest in an area where facts and circumstances vary widely—the Court concluded that the Act's waiver provisions afforded the FCC ample opportunity to consider whether the applicant's request is consistent with the public interest. The Court stated that, for those applicants who have acquired the maximum number of stations allowed by the rules, the Act requires a full hearing only if the applicant presents adequate reasons why the rules should be waived or amended.[47] In such a case, the FCC must necessarily decide whether the application of the rule in that specific instance serves the public interest; in the Court's view, the nature of this decision approximates the kind of choice made by the FCC when an applicant unaffected by any rule seeks a license. Thus, under the Court's analysis, the Commission, whether evaluating the merits of a request for the waiver of a rule or deciding whether to grant a license to an applicant who already satisfies the rule, must consider the public interest: "*In each case that comes before it* the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' "[48]

The result in *Storer* is unassailable.[49] By allowing the Commission to promulgate rules that prohibit a class of applicants—that is, those broadcasters already owning a certain number of stations—from obtaining broadcast licenses, the practical effect of the decision is to reduce the number of situations in which the FCC must engage in a comprehensive, particularized appraisal of all the factors that might affect the public interest.[50] Although a broadcaster may still

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[45] 351 U.S. at 203.

[46] *See* 351 U.S. at 203-04.

[47] 351 U.S. at 205. An adequate reason for waiver, according to the Court, is one "sufficient if true, to justify a change or waiver of the Rules." 351 U.S. at 205. The FCC, however, strictly limits waiver grants. For example, in 1975 the FCC, without holding a hearing on the matter, announced that it would not grant a waiver of the newspaper-broadcast cross-ownership rules to Joseph Allbritton and the *Washington Star*. According to one trade publication, in this announcement

> [t]he FCC . . . met the first real-world test of its newspaper-broadcast cross-ownership rules with a clear sign that it will be slow to grant the waivers it had left itself for hardship cases. . . . [T]he FCC's action contained a message that was presumably being read with interest in offices far from Washington: that the Commission will not be easily persuaded to grant waivers of its crossownership rules, particularly now, with the Star case as precedent.

BROADCASTING, Aug. 4, 1975, at 23. *See generally* 46 GEO. L.J. 166, 168 (1957). In this light, it will probably become increasingly difficult to make a showing of "sufficient justification" to obtain a waiver hearing.

[48] 351 U.S. at 205 (emphasis added) (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943)). In *National Broadcasting*, the Court upheld the FCC's chain broadcasting regulations under which licenses were denied without individual hearings, which created a waiver issue identical to the one in *Storer*.

[49] *But see* 46 GEO. L.J. 166, 169 (1957).

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[50] By utilizing rulemaking rather than adjudicatory proceedings, *see generally* B. SCHWARTZ, ADMINISTRATIVE LAW 183-90 (1976), the FCC can reduce the number of situations in which a particularized appraisal must be made of all the factors that might affect the public interest. Of course, the FCC must consider all of these factors when deciding to grant or to deny a license application in an adjudicatory proceeding. *See* McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir.), *modified*, 239 F.2d 219 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *cf.* Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951) (failure to make specific findings on each factor does not invalidate a ruling so long as the findings on the factors considered are sufficient to support the result). Similarly, the FCC must consider these factors when it promulgates a rule. *See* Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969). Once promulgated, however, such a rule might require the applicant to satisfy certain conditions before the agency will hold an adjudicatory hearing to consider all factors in the public interest. Such conditions precedent might mandate that the applicant show both the presence of particular factors deemed to be of special public importance that favor the approval of his application and the absence of certain factors that especially support the denial of the application. *See, e.g.*, Second Report & Order, *supra* note 5, at 1074-75 (after considering how newspaper ownership of broadcast stations might affect the public interest by limiting media diversity, the Commission concluded that diversification of ownership was such an important factor that FCC rules should provide that newspaper owners are precluded from acquiring broadcast stations located in the newspaper's market). Thus, a rule limits the number of instances in which all of the factors need be considered.

In short, it is clear that in an adjudicatory proceeding the FCC must consider all factors relevant to the public interest in determining whether to grant or deny an application for a broadcasting license. Yet *no hearing is required* if an application does not satisfy a rule validly enacted by the FCC, which must have considered all the relevant factors in promulgating the rule. Moreover, a waiver of the rule is not called for by the applicant's showing that in his case the public interest would best be served by discounting the factor deemed to be of special importance in the FCC rule. *See* note 51 *infra*.

In contrast to the FCC rules that disqualify a particular group of applicants for broadcasting licenses—such as the multiple-ownership rules in *Storer* and in the Second Report and Order, *supra* note 5—Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), concerned an FCC policy statement that favored renewal applicants and, in effect, rejected other fully qualified applicants without a hearing. *See* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). Petitioners challenged this policy statement on the ground that it violated the hearing provision of § 309(e) of the Communications Act, *see* note 40 *supra*, and that its method of enactment did not comply with the Administrative Procedure Act, 5 U.S.C. § 551(4) (1970), which requires that certain procedures be followed in rulemaking proceedings. The court did not reach the latter issue, although it did question the propriety of the FCC's action. 447 F.2d at 1204 n.5. The court did scrutinize the § 309 challenge and held that the policy statement violated that provision because it failed to provide license applicants with a full hearing in which all the relevant criteria are considered:

> The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. * * * It must take into account *all the characteristics* which indicate differences, and reach an over-all relative determination *upon an evaluation of all factors*, conflicting in many cases.

447 F.2d at 1212 (quoting Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 356-57 (D.C. Cir. 1949)) (emphasis added). The Court stated that this result was not inconsistent with *Storer*:

Whatever the power of the Commission to set basic qualifications in the public request a waiver of the FCC rule and force the agency to consider all of the factors relevant to the public interest, the rule does create a presumption against the applicant in this situation that does not exist in an ad hoc proceeding.[51] It is patently reasonable that the FCC, vested with the authority to regulate the broadcast media, may create such presumptions against broadcasters,[52] since no benefit can be derived from conducting hearings in situations where a particular factor—in this case, diversity of ownership—is so important that it almost always overrides all other considerations.

IV. *NCCB*: JUDICIAL APPROVAL OF FCC'S RULEMAKING AUTHORITY

Certainly the Communications Act as interpreted in *Storer* vests

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> interest and to deny hearings to *unqualified* applicants, the cases cited above [including *Storer*] cannot be read as authorizing the Commission to deny *qualified* applicants their statutory right to a *full hearing* on their own merits.

447 F.2d at 1212 n.34 (emphasis original). *See also* 447 F.2d at 1213 n.36; note 63 *infra* and accompanying text. The court also noted that the FCC *in a rulemaking proceeding*—as opposed to adjudicatory hearings or policy statements—could specify standards for renewal if such rules were consistent with the public interest. 447 F.2d at 1213 n.35. The court also "note[d] with approval that such rule making proceedings may soon be under way." 447 F.2d at 1213 n.35. For the status of the proceedings on renewal standards, see Docket No. 19154, 43 F.C.C.2d 1043 (1973).

[51] For example, suppose five factors determine whether the FCC grants a broadcasting license in each case. Suppose further that factor A, diversity of media ownership, usually has a weight of 10, while the other four factors usually have a weight of one each. In the absence of rules prohibiting concentration of media ownership, the FCC is forced in every case to make a particularized appraisal and showing that 10 is greater than the combined weights of factors B, C, D, and E. However, when the FCC in a rulemaking proceeding determines that 10 is usually greater than the combined weights of B, C, D, and E, an applicant requesting a waiver to the rule bears the burden of proving that in his case diversification of ownership is not the dominant consideration. Thus, even if waivers are occasionally granted, the establishment of a rule nevertheless reduces the number of instances of particularized appraisal by the FCC.

[52] The judiciary has recognized that the license applicant who must request a waiver hearing in order to seek a license is subject to greater burdens than the applicant who is barred by no rule and thus can move directly to the ad hoc proceeding. The applicant desiring waiver must plead "specific facts and circumstances which would make the general rule inapplicable." Tucson Radio, Inc. (KEVT) v. FCC, 452 F.2d 1380, 1382 (D.C. Cir. 1971). Reviewing courts are reluctant to order agencies to carry out waiver proceedings; "[t]hus, a heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those that have been carefully considered at the rulemaking proceeding." Industrial Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970). *See also* American Tel. & Tel. Co. v. FCC, 539 F.2d 767, 775 (D.C. Cir. 1976). *See generally* Washington Util. & Transp. Commn. v. FCC, 513 F.2d 1142, 1160-65 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

Although it is not implausible that Congress sought to vest the FCC, which is charged with the authority to regulate the broadcast industry, with the power to relegate certain broadcasters to the waiver procedure, it can be disputed, in view of the burdens imposed, whether Congress intended the FCC to be able to require nonbroadcasters to forgo the hearing requirement of § 309(a) and use the waiver procedure.

the FCC with the general power to pursue the policy of diversification of ownership by adopting rules that prohibit certain *broadcasters* from obtaining licenses. Moreover, the policy considerations discussed earlier with respect to the multiple-ownership rules in *Storer* are equally indicative of the need for rules to regulate media cross-ownership. It is questionable, however, whether the Act enables the FCC to make rules that prohibit the licensing of all members of a group who are *not* broadcasters, since broadcasting is the only media expressly covered by the Act and *Storer* involved rules that regulated only the holdings of broadcasters.[53] Thus, it is by no means certain that the Act allows the FCC to adopt a rule preventing newspaper owners from obtaining licenses for co-located broadcast stations.[54]

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[53] *Storer* contains language suggesting that a narrow reading of the case is not unreasonable. In discussing whether Storer had standing to challenge the FCC rules, the Court stated: "The regulations here under consideration presently aggrieve the respondent. The Commission exercised a power of rulemaking *which controls broadcasters.*" 351 U.S. at 199 (emphasis added).

That the FCC can consider a broad range of factors unrelated to broadcast communication itself—such as newspaper ownership—in the context of ad hoc hearings is clear. *See* note 54 *infra.*

[54] *See* Reply Comments of the American Newspaper Publishers Association in Opposition, at 7 (filed August 18, 1971), *In re* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC Docket No. 18110. Congress, the courts, and the FCC all agree, however, that the Commission "can consider the fact that a broadcast applicant is a newspaper . . . in the context of *ad hoc* licensing proceedings." *Id.* *See, e.g.*, McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir.), *modified*, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); Orlando Daily Newspapers, Inc., 11 F.C.C. 760, 767-68 (1946) ("[I]n considering conflicting applications between an applicant having no newspaper interests and one controlling newspapers, particularly where no other daily papers are published in the community, the Commission has on numerous occasions favored the former."). *See also* Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 63 (D.C. Cir. 1958), *modified*, 295 F.2d 131 (D.C. Cir.), *cert. denied*, 366 U.S. 918 (1961); Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 683 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); Easton Publishing Co., 17 F.C.C. 942, 973-74 (1953); Lubbock County Broadcasting Co., 16 F.C.C. 293, 323-24 (1951); Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 Geo. L.J. 378 (1954).

The Commission has acknowledged that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." Second Report & Order, *supra* note 5, at 1075. For this reason the Commission limited the geographic effect of its cross-ownership rules. *Id.* Moreover, the Communications Act does not exclude newspaper publishers from eligibility for broadcast licenses; it excludes only aliens, foreign controlled corporations, and those whose licenses have previously been revoked for violations of the antitrust laws in the communications field. 47 U.S.C. §§ 310(a), 313(b) (1970 & Supp. V 1975). *But cf.* the statement of Senator Clarence Dill, author of the Communications Act of 1934, *quoted in* Note, *Antitrust—"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, 47 N.C.L. Rev. 794, 810 n.97 (1967):

> If I had dreamed that newspapers would acquire radio and television stations, I would have written a prohibition into the act. Certainly newspapers which occupy monopoly positions in a city should not be permitted also to own radio and television stations. This country cannot afford to have monopoly over public opinion any more than it can afford to have monopoly in industry.

Furthermore, although a newspaper owner can force the FCC to conduct a waiver hearing to consider all the factors affecting the public interest, it is not clear that Congress intended to empower the FCC to promulgate rules that create presumptions against *nonbroadcasters* and that relegate them to the waiver process for obtaining licenses.

The FCC concluded in the Second Report and Order that it did possess the power to regulate newspaper-broadcast cross-ownership,[55] and, in *NCCB*,[56] the Court of Appeals for the District of Columbia Circuit was quick to agree with the Commission's conclusion. The court cited those provisions of the Communications Act—sections 4(i),[57] 303(r),[58] and 309(a)[59]—that authorize the FCC to regulate broadcast licensing and then stated:

> In *United States v. Storer Broadcasting Co.*, . . . the Supreme Court upheld a portion of the Commission's multiple ownership rules promulgated under these provisions. In essence, *Storer* permits the Commission to codify in rule its understanding, if reasonable, of the public interest licensing standard. . . . Here, the Commission has determined the public interest would not be served by granting broadcast licenses to newspapers and [earlier in the opinion] we held this policy was reasonable. It requires no extension of *Storer* to conclude the Commission possessed statutory authority to impose the prospective ban.[60]

The ease with which the court concluded that *Storer* was dispositive of the appeal of the Second Report and Order is somewhat troublesome. Certainly the rules upheld in *Storer* and those affirmed in *NCCB* are grounded on the same policies—promoting diversification of mass media ownership and, concomitantly, furthering "the widest possible dissemination of information from diverse and antagonistic sources."[61] Yet it is not clear that the Communications Act authorizes the FCC to pursue such policies by regulating *nonbroadcasters*. In effect, the reasoning of *NCCB* would allow the Commission to adopt a rule prohibiting newspaper owners, dentists, or any other specified group from obtaining a broadcast license if the Commission can demonstrate in a valid rulemaking proceeding that such a rule would be in the public interest. It is not obvious that Congress intended the Act to reach this far.

The *NCCB* court recognized this difficulty of statutory breadth when it stated that "the rules under review [do not] involve regulation of an industry over which the Commission lacks jurisdiction. The prospective ban simply imposes qualifications for broadcast licenses."[62] Literally speaking, the court is correct: its opinion simply reflects the position that newspaper owners as a class are "unqualified" to own co-located broadcast stations.[63] Yet it is possible that Congress never intended to vest the FCC with the authority to make this type of qualification. Even if Congress intended to allow the FCC to consider newspaper ownership as one factor among many others in an ad hoc proceeding,[64] it does not necessarily follow that Congress meant to give the FCC the power to deem all co-located newspaper-broadcast combinations to be ipso facto contrary to the public interest.[65] It therefore is necessary to consider directly the extent of power Congress intended to vest in the FCC in order to determine whether the Commission has the power to prescribe the rules affecting newspaper owners announced in the Second Report and Order.

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[55] *See* text at notes 24-28 *supra*.

[56] 555 F.2d 938 (D.C. Cir. 1977).

[57] 47 U.S.C. § 154(i) (1970).

[58] 47 U.S.C. § 303(r) (1970).

[59] 47 U.S.C. § 309(a) (1970).

[60] 555 F.2d at 951 (citation and footnote omitted).

[61] Associated Press v. United States, 326 U.S. 1, 20 (1945). *See* note 24 *supra*.

V. CONGRESSIONAL INTENT REGARDING FCC RULEMAKING POWER

Resolution of the question whether Congress intended the FCC to be able to prescribe rules affecting newspaper owners as a class is aided by examination of the history of FCC actions involving newspaper ownership and of the congressional response to these actions. In January 1937, three years after the adoption of the Communications Act, Senator Burton Wheeler, Chairman of the Senate

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[62] 555 F.2d at 952 n.41.

[63] The court declared that "it is reasonable for the Commission [through rulemaking] to consider newspapers as 'unqualified' to acquire licenses in the city of publication." 555 F.2d at 955 n.52. *See* note 54 *supra*.

[64] *See* note 54 *supra*.

[65] This analysis is subject to criticism, however. The Court in *NCCB* asserted that no extension of *Storer* was required to uphold the Second Report and Order, *see* text at note 60 *supra*, and thus the arguments used to validate the multiple-ownership rules in *Storer* can be used to criticize the position that the rules in the Second Report and Order are invalid. Thus, the waiver provisions, to the extent that they were found sufficient to protect broadcasters in *Storer*, arguably are adequate to protect newspaper owners affected by the Second Report and Order. *See* 555 F.2d at 955 n.51. In addition, *Storer* held that, notwithstanding the absence of express authorization in the Act, the FCC can promote diversification by promulgating rules that limit the number of stations a licensee may own; this holding suggests that the Act's lack of express language authorizing newspaper-broadcast cross-ownership rules should not bar FCC regulatory efforts. However, both of these arguments suffer from a weakness noted earlier, *see* text at notes 60-62 *supra*, in that they assume that the Communications Act was intended to authorize the FCC to regulate newspaper owners and all other nonbroadcasting groups. Although it may be that the opportunity for waivers in fact does adequately protect the interest of newspaper owners, it is not certain that Congress intended to allow the FCC to require nonbroadcasters to resort to the waiver procedure as the sole method for acquiring a license.

Interstate Commerce Committee, asked for "an opinion from the Chief Counsel of the [FCC] on the question as to whether or not the Commission has the authority, at the present time, to deny an application of a newspaper for radio facilities, on the ground that it is against public policy."[66] The FCC, in an opinion prepared by Hampson Gary, the Commission's first General Counsel, concluded that

> the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy.[67]

The opinion went on to state that the Commission had the duty to examine all the facts concerning a license application, including "the business connections of the applicant, newspaper or other," and that the Commission could deny a newspaper owner a broadcast license if upon all the facts it could not find that granting a license would serve the public interest.[68]

Although the Gary opinion can be interpreted in several ways,[69]

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[66] Comments of American Newspaper Publishers Association in Opposition, at 16 (filed April 2, 1971), *In re* Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC Docket No. 18110 (quoting letter from Senator Wheeler to the FCC (Jan. 7, 1937)). *See also* Heckman, *supra* note 54, at 390-93.

[67] Comments of American Newspaper Publishers Association in Opposition, *supra* note 66, at 16 (quoting Mr. Gary's opinion (Jan. 25, 1937)), *reprinted in* Legal Memoranda in Support of Comments of American Newspaper Publishers Association, Memorandum F, Attachment A, at 3 (filed April 2, 1971), *In re* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC Docket No. 18110

[68] Legal Memoranda in Support of Comments of American Newspaper Publishers Association, *supra* note 67, Memorandum F, Attachment A, at 3 (reprinting Mr. Gary's opinion).

[69] *See* Stahlman v. FCC, 126 F.2d 124, 127 (D.C. Cir. 1942); 9 Fed. Reg. 702-03 (1944); Foley, The Newspaper-Radio Decision, 7 FED. COM. B.J., Feb. 1944, at 11-12. *See generally* Mills, Moynahan, Perlini & McClure, *supra* note 7, at 1217-19.

Opponents of the newspaper-broadcast cross-ownership rules have cited the Gary opinion as a long-standing administrative interpretation that took a restrictive view of the Commission's authority. They have argued that the opinion is entitled to great authoritative weight because it involved an early construction of the Communications Act by the FCC's first General Counsel, who should have been uniquely aware of Congress' intent in passing the Act. *See* Comments of American Newspaper Publishers Association in Opposition, *supra* note 66, at 16-17. *See generally* Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.06 (2d ed. 1958).

However, in Second Report & Order, *supra* note 5, at 1051, the FCC developed four reasons to justify its decision to treat the Gary opinion as irrelevant to the question whether the Commission could prohibit newspaper-broadcast cross-ownership. First, the Gary opinion dealt with ad hoc comparative proceedings rather than rule-making proceedings. Second, the opinion was concerned with denying licenses to all a proper analysis indicates that the opinion is not relevant to a determination of the FCC's authority to prohibit newspaper-broadcast cross-ownership. Critics of the Second Report and Order can argue that the Gary opinion intimates that the FCC cannot deny broadcast licenses to individuals *solely* because they own newspapers, which in turn suggests that a rule prohibiting newspaper-broadcast cross-ownership is invalid. However, Gary was responding to the question whether the FCC had the power *to deny a license application* to a newspaper owner on the ground that granting the license would violate a *public policy* standard, not whether the FCC may *promulgate a rule* affecting all such owners based on the Communication Act's public interest standard.[70] Thus, as the court in *NCCB* correctly observed,[71] the Gary opinion does not provide any relevant insight into how the FCC viewed its mandate at an early stage in the Commission's development.

The Commission next focused on cross-ownership in 1941, when it initiated an extensive three-year investigation of newspaper ownership of broadcast facilities.[72] After compiling a massive record,[73] the Commission dismissed the proceedings without promulgating any new rules: "The Commission has concluded, in the light of the record in this proceeding and of the grave legal and policy questions involved, not to adopt any general rule with respect to newspaper ownership of radio stations."[74] Although the Commission did not elaborate upon the nature of the "grave legal and policy questions,"

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newspaper owners rather than just to those who seek licenses for broadcasting stations existing in the same locale as the newspapers they own. Third, prior statements by a regulatory agency regarding its jurisdiction are not determinative of the legality of any subsequent efforts to assert jurisdiction, *see, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157, 169-70 (1968). Fourth, the problems of cross-ownership and concentration of media ownership are much different today than they were in 1937.

[70] *See* Legal Memoranda in Support of Comments of American Newspaper Publishers Association, *supra* note 67, Memorandum F, Attachment A, at 1-2 (reprinting Mr. Gary's opinion).

[71] 555 F.2d at 951-52.

[72] FCC Order No. 79, 6 Fed. Reg. 1580 (1941); FCC Order No. 79-A., 6 Fed. Reg. 3302 (1941). The Commission undertook this investigation, which was the only inquiry dealing with newspaper-broadcast cross-ownership prior to the proceedings that resulted in the Second Report and Order, as part of its early efforts to formulate policies for the licensing of FM stations. The study was subsequently expanded to cover the general problem of newspaper ownership of radio stations. *See* Legal Memoranda in Support of Comments of American Newspaper Publishers Association, *supra* note 67, Memorandum F, at 6.

[73] The investigation lasted three years, during which time the Commission took extensive written and oral testimony from leading experts in the fields of news dissemination and the law. The record of the proceedings consisted of over 3500 pages and 400 exhibits. *See* Legal Memoranda in Support of Comments of American Newspaper Publishers Association, *supra* note 67, Memorandum F, at 6; Foley, *supra* note 69, at 11, 13.

[74] 9 Fed. Reg. 702-03 (1944).

one contemporaneous account of the investigation suggested that the FCC feared encroaching upon the freedom of the press.[75] This indication that the FCC at one point questioned its own authority to promulgate a newspaper-broadcast cross-ownership rule, though seemingly relevant to a determination of the validity of the Second Report and Order, was not mentioned by the court in *NCCB*.

At the conclusion of its investigation, the Commission forwarded a summary of the evidence accumulated during the proceedings to appropriate congressional committees.[76] As a result of the Commission's investigation,[77] various proposals to prohibit the FCC from "discriminating" against newspapers when granting broadcast licenses were introduced in Congress during the 1940s.[78] The legislative history suggests that Congress failed to enact these proposals because it thought the FCC lacked the authority to adopt a rule that prohibited approving license applications from newspaper owners.

The first proposal was the White-Wheeler bill,[79] which, as subsequently incorporated into the White-Wolverton bill,[80] sought to add a new section to the Communications Act prohibiting the Commission from making a rule "to effect a discrimination between persons based upon race, religious or political affiliation or kind of lawful occupation or business association."[81] The principal intent of this section was to prohibit the FCC from promulgating a rule that prevented newspaper owners from obtaining broadcast licenses.[82]

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[75] Foley, *supra* note 69, at 15, stated that "[t]here was a general agreement among several of the witnesses that a general rule excluding newspapers from the obtaining of licenses to operate radio stations would be a limitation on a free press."

[76] Although the FCC's hearings ran only from July 1941 to February 1942, the Commission did not officially close the proceedings and send a summary of the evidence to Congress until January 1944. According to the Commission, it forwarded the evidence to Congress "in order to inform them of the facts developed by the investigation and for any consideration which they may decide to give the matter." 9 Fed. Reg. 702-03 (1944). However, Congress had already commenced hearings on the White-Wheeler Bill, S. 814, 78th Cong., 1st Sess. § 32 (1943), discussed in text at notes 79-84 *infra*, by the time it received the summary of evidence from the FCC. *See Hearings on S. 814 Before the Senate Comm. on Interstate Commerce*, 78th Cong., 1st Sess. 406 (1943).

[77] *See* S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949).

[78] S. 1973, 81st Cong., 1st Sees. § 14 (1949); S. 1333, 80th Cong., 1st Sess. § 25 (1947); S. 814, 78th Cong., 1st Sess. § 32 (1943).

[79] S. 814, 78th Cong., 1st Sess. § 32 (1943).

[80] S. 1333, 80th Cong., 1st Sess. § 18 (1947).

[81] *Id.*

[82] *See* S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949). *See also Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong. 1st Sess. 20-21 (1949) (quoting remarks of acting FCC Chairman Rosel Hyde on the subsequent 1949 McFarland proposal, which contained relevant language identical to the White-Wolverton bill: "The principal intent of the section is, of course, to outlaw the possibility of any rule excluding newspaper owners from owning radio stations").

In testimony before a Senate subcommittee, acting FCC Chairman Charles Denny stated that the proposed section merely reflected current Commission practice and that a newspaper owner was qualified to become a radio station licensee.[83] Consideration of the proposal was subsequently terminated in 1947.[84]

In 1949 a virtually identical antidiscrimination proposal was introduced by Senator Ernest McFarland as part of a bill intended to revise several sections of the Communications Act.[85] Testifying before a Senate subcommittee, acting FCC Chairman Rosel Hyde stated that, although the Act contained no language expressly prohibiting the Commission from adopting a rule preventing all persons engaged in a particular business—such as publishing newspapers—from obtaining a license, the Commission nevertheless did not have the authority under the Act to promulgate such a rule *even if* it were believed to be in the public interest.[86] The subcommittee, persuaded by Chairman Hyde's testimony,[87] subsequently eliminated the antidiscrimination proposal from the bill. In its report on the bill ultimately sent to the Senate floor, the full committee explained the decision to delete the antidiscrimination proposal as follows:

> It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.[88]

The Senate approved the committee's recommended amendments to the Communications Act,[89] and the bill then went to the House of Representatives for consideration. The House committee to which the bill was assigned added an antidiscrimination provision, the so-called "newspaper amendment,"[90] similar to the amendments that had been considered by the Senate committee. During debate on the House floor, Congressman Oren Harris explained that the purpose of the antidiscrimination provision was "to make it clear beyond any reasonable doubt that the Communications Act does not authorize adoption by the Commission of any blanket rule or any arbitrary policy with respect to the granting of radio or television stations to newspapers."[91] The package of amendments to the Communications Act subsequently passed by the House included the newspaper amendment.[92] The Senate-House conference committee handling the bill, however, deleted the newspaper amendment, concluding that an antidiscrimination provision was unnecessary. In the committee's view, the existing Act did not authorize the Commission to promulgate a rule that would deny an individual a broadcast license because he owned a newspaper.[93]

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[83] *See Hearings on S. 1333 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 44 (1947).

[84] *See* Comments of American Newspaper Publishers Association in Opposition, *supra* note 66, at 18.

[85] Section 14 of S. 1973, 81st Cong., 1st Sess. (1949), as originally proposed, was intended to add § 332 of the Communications Act. It provided:

> Limitations on Rule-Making Powers; Discrimination Prohibited
>
> Sec. 332. No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation or kind of lawful occupation or business association.

[86] *See Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 103-04 (1949).

[87] *See* S. REP. No. 741, 81st Cong., 1st Sess. 2-3 (1949).

[88] *Id.*

[89] 95 CONG. REC. 11048-52, 11090 (1949).

[90] *See* Comments of American Newspaper Publishers Association in Opposition,

It is difficult to discern why Congress concluded that the Communications Act did not authorize the Commission to promulgate rules regulating newspaper ownership of broadcast stations.[94] The clearest expression of Congress' reasoning exists in a Senate committee report of that time: referring to the FCC's efforts in the 1940s to promulgate a newspaper-radio cross-ownership rule, the committee noted that the FCC's "threatened action was of *questionable constitutional validity*, particularly in the absence of specific authority in the basic act to adopt such a rule."[95] Although the committee failed to indicate which portions of the Constitution such a rule might violate, presumably the fifth and first amendments are the most logical provisions upon which to challenge the rule.

The committee might have believed that a cross-ownership rule applicable only to newspaper owners would violate the equal protection requirement inherent in the due process clause of the fifth amendment. The Communications Act does not permit the FCC to construct "arbitrary and capricious classification[s] of entities by irrelevant standards."[96] Thus, if Congress believed that no rational

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supra note 66, at 21; Legal Memoranda in Support of Comments of American Newspaper Publishers Association, *supra* note 67, Memorandum F, at 9.

[91] 98 Cong. Rec. 7420 (1952).

[92] *Id.* at 7421.

[93] The conference committee expressed the opinion that "under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information." H.R. Rep. No. 2426, 82d Cong., 2d Sess. 18-19 (1952).

[94] The elusive reasoning of Congress provoked much speculation concerning congressional intent. *See, e.g.*, Bennett, *supra* note 24, at 192; Note, *Newspaper-Radio Joint Ownership: Unblest Be the Tie That Binds*, 59 Yale L.J. 1342, 1350-51 (1950).

[95] S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949) (emphasis added).

[96] Comments of the United States Department of Justice, at 17 (filed May 19,

reason existed to apply special rules to newspaper owners, it would have assumed that the Commission had no power to make a newspaper-broadcast cross-ownership rule. It is unlikely, however, that Congress was thinking in these fifth amendment terms. Even as the congressional committee hearings on the various Communications Act amendments were being held, the Commission was taking newspaper ownership into consideration when denying broadcast license applications in ad hoc comparative proceedings.[97] Because courts had upheld the results of these proceedings,[98] Congress presumably realized that the standards used by the FCC to determine whether to grant a license—including newspaper ownership—were not irrelevant, arbitrary, or capricious, and therefore not violative of the fifth amendment.[99]

A more plausible explanation of congressional concern is that Congress believed that a rule denying broadcast licenses to newspaper owners might violate the first amendment's protection of the freedom of the press.[100] Clearly the principal thrust of the antidiscrimination amendments proposed in Congress was to prevent discrimination against newspapers, and this may imply that first amendment considerations prompted Congress' narrow view of FCC authority. Moreover, concern for freedom of the press was emphatically raised in the course of committee hearings.[101]

Although the congressional rationale for concluding that the Communications Act did not authorize the FCC to promulgate newspaper-broadcast cross-ownership rules is unclear, a decision of the Court of Appeals for the District of Columbia, which was announced during the FCC's 1941-1944 investigation of newspaper ownership of broadcast facilities, reached the same conclusion and implicitly based this determination on the first amendment grounds. In *Stahlman v. FCC*,[102] the appellant, a newspaper publisher, re-

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1971). *In re* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC Docket No. 18110.

[97] *See, e.g.*, Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1949). *See also Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 44 (1947); note 54 *supra*.

[98] *See* Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); note 54 *supra*. *Cf.* Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1949) (denial of license because of ownership of local newspaper reversed because FCC failed to consider that the opposing license applicant owned several newspapers in the surrounding area).

[99] *See generally* S. REP. No. 741, 81st Cong., 1st Sess. 2 (1949).

[100] *Cf.* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (Justice Stewart notes that the publishing business is the only private business given explicit constitutional protection.).

[101] *See Hearings on S. 814 Before the Senate Comm. on Interstate Commerce*, 78th Cong., 1st Sess. 436-46 (1943).

[102] 126 F.2d 124 (D.C. Cir. 1942).

fused to comply with an FCC subpoena on the ground that it was issued in connection with an investigation that the Commission was not authorized to undertake.[103] The court concluded that the FCC did possess the general power to conduct the proceeding, and therefore the court required the appellant to respond to the subpoena. In dicta, however, the court stated that, if the investigation had been undertaken solely for the purpose of considering or adopting a rule rendering newspaper owners ineligible to receive broadcast licenses, the inquiry would have been "wholly outside of and beyond any of the powers with which Congress has clothed the Commission."[104] The court then suggested that a rule banning newspaper ownership of broadcast stations would violate the first amendment because it "would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves."[105] Unwilling to press its constitutional analysis further, the court declined to consider whether Congress possessed the authority to legislate such a prohibition.[106] Although the court did not elaborate upon the scope accorded the free press right in the context of broadcast licensing, it was obviously concerned about the constitutional implications of a newspaper-broadcast cross-ownership rule. Having already determined that the Communications Act did not authorize the FCC to make such a rule, the court concluded that, putting aside potential constitutional difficulties, any extension of the FCC's power in this area must be expressly authorized by Congress:

> Hence it is that in the present state of the law a newspaper owner who is also the owner of a broadcast station may very well say to whoever challenges this dual right: "Who art thou that judgest another man's servant. To his own master he standeth or falleth."[107]

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[103] 126 F.2d at 126.

[104] 126 F.2d at 127.

[105] 126 F.2d at 127.

[106] 126 F.2d at 127.

[107] 126 F.2d at 127-28 (quoting *Romans* 14:4). Although the Supreme Court upheld FCC rules limiting eligibility to receive a broadcasting license in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), and National Broadcasting Co. (NBC) v. United States, 319 U.S. 190 (1943), the question discussed in the *Stahlman* dicta—the power of the FCC to regulate newspaper ownership of broadcast stations as opposed to its power to regulate broadcasters themselves—was not specifically addressed in either *NBC* or *Storer*. Despite this fact, the District of Columbia Circuit in *NCCB* rather disingenuously relied on *NBC* to distinguish its earlier suggestion in *Stahlman* that the FCC lacks the power to adopt rules affecting newspaper-broadcast combinations. The *NCCB* court first noted that the *Stahlman* discussion was dicta and therefore lacked precedential value. The court then referred to other language in *Stahlman* that suggested that any applicant satisfying certain qualifications—citizenship, character, and various financial and technical standards—"must be granted a frequency if one is available." The *NCCB* court stated that this

VI. THE NEED FOR CONGRESSIONAL CLARIFICATION

The reluctance of the FCC in the 1940s to promulgate a newspaper-broadcast cross-ownership rule and the history of congressional inaction between 1943 and 1952 are hardly conclusive support for the position that the Communications Act does not empower the FCC to adopt rules such as those found in the Second Report and Order. Certainly an agency's view of its own authority can evolve over the years, and an agency should not be bound to opinions expressed in earlier times and under different circumstances.[108] Moreover, post-adoption history has minimal weight for purposes of statutory construction, since statutes are usually construed "with reference to the circumstances existing at the time of the passage."[109] The court in *NCCB*, therefore, correctly refused to conclude on the basis of this evidence alone that the FCC lacked the authority to promulgate a newspaper-broadcast cross-ownership rule.[110] Nevertheless, it is unfortunate that the *NCCB* court refused to consider *why* Congress first proposed and then rejected legislation barring the FCC from adopting rules affecting newspaper-broadcast combinations. The court's reluctance to address the crucial question—whether Congress intended the Communications Act to authorize the FCC to pursue the policy of diversification of ownership through a rule barring co-located newspaper-broadcast combinations—undercuts the legitimacy of the *NCCB* decision.

The Supreme Court will have an opportunity to resolve this matter when it reviews *NCCB*.[111] It might behoove the Court to address this question in light of the previously discussed evidence that Congress might not have intended the Communications Act to authorize the FCC to adopt rules such as those found in the Second Report and Order.[112] This legislative history, however, is admittedly sketchy, and, given this uncertainty, the Supreme Court would encounter some difficulty in attempting to determine how much authority Congress has given the FCC to promulgate newspaper-broadcast cross-ownership rules.

Congress can more easily resolve this issue—regardless of whether the Supreme Court determines the Commission's authority under the

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view was later repudiated by the Supreme Court in *NBC*, which indicated that the *Stahlman* dicta was based on an interpretation of the Act that has been subsequently abandoned. 555 F.2d at 952.

[108] *See* Second Report & Order, *supra* note 5, at 1051.

[109] United States v. Wise, 370 U.S. 405, 411 (1962).

[110] 555 F.2d at 951.

[111] This question is among those raised by the petitions for certiorari growing out of the *NCCB* case. *See* note 23 *supra*.

[112] The Supreme Court's resolution of this question is crucial in reviewing

current statute—by explicitly endorsing the Second Report and Order and the *NCCB* decision or by stating expressly that the FCC lacks the power to make such rules and that such regulations must be statutorily prescribed by Congress.[113] In any event, since various congressional committees are currently reviewing the Communications Act in its entirety,[114] Congress now has a most timely opportunity to address the issues posed by newspaper owners controlling or acquiring broadcast stations.[115]

NCCB, for if the FCC is found not to have authority to promulgate such rules, the other questions raised by petitioners for review are moot. But as in the court of appeals decision, the Court could assume this FCC authority.

[113] A congressional pronouncement in this regard would also be preferable to the FCC's assertion of its own authority. *See generally* Wright, Book Review, 81 Yale L.J. 575 (1972), where Judge J. Skelly Wright expressed the view that Congress itself should articulate public policy rather than delegate this responsibility to commissions not subject to the democratic process.

Congress is capable of legislating with sufficient specificity to make a clear pronouncement of the FCC's authority to regulate cross-ownership of media. *See generally* Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183, 1189-90 (1973):

> It does not make sense to say that the burdens of the congressional workload and the pressure exerted by opposing political forces preclude a detailed legislative solution to a given problem, so that vague, general delegation is the better or the only alternative. The monumental detail of the tax code suggests that Congress can, and does, legislate with great specificity when it regards a matter as sufficiently important. Nor can a political conflict be avoided by relegating a problem to the care of an agency and invoking the talisman of "expertise." The effect of such a transfer of function is simply to shift the legislative process to a different level, and there is no reason to believe that the agency will be able to rise above power conflicts to achieve solutions that the legislature itself cannot or does not choose to provide.

[114] *See* Broadcasting, Oct. 3, 1977, at 30-31; Broadcasting, Sept. 5, 1977, at 28, 32-33; Broadcasting, Aug. 8, 1977, at 21-25; Broadcasting, July 18, 1977, at 23-24; Broadcasting, July 4, 1977, at 25; Broadcasting, June 13, 1977, at 32, 34, 36-37; Broadcasting, May 30, 1977, at 19; Broadcasting, May 2, 1977, at 26-27; Broadcasting, April 25, 1977, at 21-23; Broadcasting, April 11, 1977, at 37-38; Broadcasting, Feb. 21, 1977, at 60-62; Broadcasting, Dec. 20, 1976, at 25; Broadcasting, Oct. 11, 1976, at 30; Broadcasting, Aug. 30, 1976, at 30-31.

[115] Congressional clarification of the role of the FCC in this area is also required because of rapidly changing technologies in the mass communications media. It is significant that, in construing the Communications Act, the court in *NCCB* was limited to considering 'the circumstances existing at the time of passage.' 555 F.2d at 952 n.41 (quoting United States v. Wise, 370 U.S. 405, 411 (1961)). The assumptions made in 1934 about regulatory needs in the communications area were of course based on the circumstances existing at that time, and many of them are no longer valid in light of modern technologies.

Some of these new technologies have a direct impact upon newspaper-broadcast combinations. The cross-ownership rules are based on the Commission's long-standing policy that "diversification of media sources is of central importance." 555 F.2d at 963; *see* Second Report & Order, *supra* note 5, at 1048. Diversification, however, is based on the assumption that the available broadcast spectrum is a limited resource. 555 F.2d at 948, 950 n.31. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943). As noted by Chief Judge Bazelon in *NCCB*, "currently available technology could eliminate this scarcity. . . . Alleviating scarcity would . . . eliminate the need for promoting diversity." 555 F.2d at 950 n.31. Although Chief Judge Bazelon emphasized that such "hopes for the future do not diminish the importance

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of encouraging diversity today," 555 F.2d at 950 n.31, it would seem appropriate that Congress should consider whether the new technology has undermined the basis of the fundamental national policy of encouraging diversity to such an extent that newspaper-broadcast cross-ownership rules are not necessary to protect the public interest. *Cf.* United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C.J., concurring) (arguing that the advent of cable television calls for a congressional reexamination of the Communications Act).

COMMENTARY

An Economic Analysis of the FCC's Multiple Ownership Rules*

Allen Parkman

The recent Supreme Court decision[1] upholding the 1975 Federal Communications Commission's (FCC) modifications[2] of its multiple ownership rules[3] has again drawn attention to the question of the optimal structure of the electronic mass media. Under the FCC's 1965 Policy Statement,[4] diversification of ownership so as to generate diversity in viewpoints and programming was established as being the most important issue governing the choice of who was to succeed in a comparative hearing pertaining to the issuing of a license for either a radio or TV station. The multiple ownership rules now prospectively permit a party to own only one AM-FM combination, one VHF TV, or one or more daily newspapers in a given market. Radio-UHF TV station combinations are viewed on a case by case basis.[5] In addition, one party can own no more than seven AM, seven FM or seven TV licenses, and only five of the TV licenses can be VHF.[6] This article discusses the results of the multiple ownership rules if viewpoints and programming on television are viewed as economic goods rather than as the free goods that are implicit in the FCC and Supreme Court decisions. It concludes that on a local level many "voices" do not produce many viewpoints and programs. Because of scarcity, fewer voices may in fact produce more unique viewpoints and different programs. Meanwhile, the national policies of the FCC restrict the quantity of different viewpoints and programs because the FCC has ignored the economics of television networks.

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[1] FCC v. National Citizens Committee for Broadcasting, ___ U.S. ___, 98 S. Ct. 2096 (1978).

[2] Second Report and Order, 50 F.C.C. 2d 1046 (1975) [hereinafter cited as Second Report].

[3] 47 C.F.R. § 73.34, § 73.240, and § 73.636 (1977).

[4] Policy Statement on Comparative Broadcasting Hearings, 1 F.C.C.2d 393, 394 (1965).

[5] Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971).

[6] 47 C.F.R. § 73.636, note 8 (1977).

AN ECONOMIC PRIMER

An awareness of some basic economic principles is necessary to analyze the structure of the electronic mass media.[7] First, there is the distinction between free and economic goods. An economic good requires scarce resources in its production, while a free good does not. Where markets exist, an economic good can easily be identified because it has a positive price. Therefore, practically all of the goods that we observe are economic goods. In fact, there are very few examples of free goods. Clean air in the desert is one. Labor is a scarce commodity. If more reporters are sent to cover a given event, then other activities that they could be accomplishing, e.g. reporting other events or some other non-journalistic activity, have to be sacrificed. Therefore, the information produced by the reporter is clearly an economic good. Because an economic good requires scarce resources in its production, the basic economic issues of what is to be produced and who is to receive that output have to be addressed by society.

Second, there is the market in which economic goods are produced. The amount of scarce resources per unit of output required to produce an economic good varies with the level of output. One important characteristic of production in the electronic mass media is economies of scale. If an industry has high fixed costs, then the average cost of producing additional units of an economic good will decrease up to the output level where the fixed inputs are fully utilized and have to be duplicated. If for example, the output of the television industry is defined as the number of viewers watching a given program, then this is clearly an industry with significant economies of scale. A viewpoint or program requires large fixed costs in its manufacture. Since they are similar from the production point of view, let us just look at viewpoints. A unique viewpoint requires research based on the accumulation of facts followed by analysis, all of which require resources. However, after the viewpoint has been created, it can be presented to large numbers of viewers at a very small additional cost per viewer. The average cost per viewer declines as the number of viewers increases. Meanwhile, society wants to hear more than one viewpoint because variety of viewpoints is a good. The most obvious and relevant viewpoints will probably be generated first, so that the incremental benefits to society of being presented additional viewpoints declines as new viewpoints are presented. Additional viewpoints are only desirable so long as the incremental benefits exceed the incremental costs. Since significant economies of scale exist in the television industry, it would appear that the optimal number of viewpoints should be produced by a limited number of large firms.

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[7] An excellent introduction to the economics of television is available in OWEN, BEEBE, and MANNING, TELEVISION ECONOMICS (1974); and NOLL, PECK, and MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973) [hereinafter cited as NOLL, PECK, and MCGOWAN].

This discussion of the production of viewpoints leads us into the economics of the firm. A television station is a firm. A firm purchases inputs for producing outputs. In the case of televison stations, the owners produce viewpoints and programs to attract viewers for which they are paid by advertisers. Viewpoints and programs are intermediate products with viewers being the final product. The firm maximizes profits by producing viewers so long as the incremental revenues from advertisers exceed the incremental cost of producing viewpoints and programs to attract the viewers. A given TV station has basically two options when producing a viewpoint, either repeat an existing one or incur the cost of creating a new one. If a number of viewpoints already exist on a given subject, a new one will probably not attract many additional viewers. The revenues generated by the firm may not warrant the incurring of the cost. If viewers will not reward a station by their patronage for the additional viewpoints generated, then society would be better off if the station's resources were directed to some other type of programming for which viewers will reward the station with their patronage. For example, a station may contemplate sending a reporter to the governor's weekly news conference. The last time that it did that, the reporter came back with essentially the same information that was available from a wire service. Therefore, no additional viewers were produced because a unique viewpoint was not possible. This time the station uses the wire service report of the news conference and sends the reporter on another assignment. The potential diversity of viewpoints as to the news conference was reduced below what it would be otherwise, but society receives more breadth of information. Society does not want an infinite diversity of viewpoints. It wants diversity only so long as the benefits exceed the costs. The television stations, as firms, will respond to these desires by attempting to maximize their profits.

An analysis of programming will proceed in a similar manner. An episode of a TV series is expensive to produce. The average cost per viewer is very high if it is seen on only one channel. The average cost per viewer is reduced by showing it on many channels. The lowest production costs per viewer would exist if everybody were to view the program. However, viewers have heterogeneous tastes, so that society's welfare is maximized by providing variety. As the number of programs increases, the average cost per viewer of these programs increases as the number of viewers per program declines. Meanwhile, because the most popular types of programs will tend to be produced first, the incremental benefits to society of new programs decreases as additional programs are generated. Eventually a level of program diversity is reached where the incremental costs of production exceed the incremental benefits.

The last concept that needs to be discussed is the goal of a firm's activities. Traditionally, in economics, the goal of a firm has been viewed as being profit maximization.[8] However, the introduction of income taxes and the corporate form of business, for example, has made utility maximization for the decision makers a more realistic focus. An income tax reduces the cost of sacrificing profits to obtain other goals.[9] The owner of a TV station knows that beyond the level of output where profits would be maximized, there is a trade-off between the popularity of his news and profits, both of which are components of his utility function. The imposition of a corporate income tax reduces the cost of popularity. The utility maximizing owner would therefore increase the popularity of his news.

The separation of ownership and management in a corporation might have a similar effect. A manager realizes that there is a trade-off between the popularity of news presented by his station and profits. However, his compensation is only indirectly a function of the profits of the station. If he increases the popularity of the news by 1 percent, which enhances his reputation in the community, profits could be reduced by $1. Through profit sharing, stock options, and the possibility of getting fired, his expected reduction in income might be 10¢. Meanwhile, if he owned the station the reduction in his income would be $1. Since the cost of higher popularity is less to the manager than the owner, the manager has an inducement to produce a more popular product than the owner.[10]

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[8] The maximization of utility as a firm's goal rather than the maximization of profits is discussed below.

[9] If before the tax a one dollar sacrifice of profits increased popularity by 1%, a 50% tax reduces the cost of the 1% increase to 50¢. Since the manager views popularity as a good, as its cost is reduced he will demand more.

However, the freedom of the manager is limited. If the owner is willing to make a major sacrifice in potential profits to either increase the popularity or bias of the news, that is within his power, especially in a market where he has the potential for monopoly profits. However, if the manager lets the profits fall below an acceptable level, he would be replaced by the shareholders who receive no benefits from more than the profit-maximizing number of viewers. The shareholders are not willing to sacrifice profits.[11]

The remainder of this article will analyze the FCC's multiple ownership rules in the context of their effect on diversity of viewpoints and programming. These viewpoints and programs are economic goods produced under conditions of economies of scale by utility maximizing decision makers. Given this framework, it would appear that the FCC's rules are counterproductive in accomplishing their stated goal.[12] The multiple ownership rules consist of the one-to-a-market rule,[13] which controls local diversity, and the seven-seven-seven rule,[14] which controls national diversity.

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[10] This assumes that the owner and the manager have similar utility functions. If the owner feels more civically responsible or is more visible to receive public claim for his highly popular news, then their utility functions will differ. The owner may choose as high, if not a higher, level of popularity as the manager even though the cost to the owner increases.

[11] Even if most of the shareholders are passive, the lower profits will tend to drive down the value of the station's shares, making it possible for an individual who views the station as being mismanaged to buy up enough shares to gain control.

[12] "It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibilities." Second Report at 1079.

[13] 47 C.F.R. § 73.636(a)(1) (1977).

> No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mv/m groundwave contour(s) of the standard broadcast station(s), computed in accordance with § 73.181 or § 73.186, encompassing the entire community of license of the proposed station; or one or more FM broadcast stations, or will result in the predicted 1 mv/m contour of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

THE ONE-TO-A-MARKET RULE

The Second Report of the FCC which established the current "one-to-a-market rule" was adopted on January 28, 1975. It represented the cumulation of proceedings that began March 27, 1968.[15] The First Report and Order which prohibited prospective combinations of AM, FM, or TV stations in the same market was adopted on March 25, 1970.[16] A Memorandum Opinion and Order adopted in 1971 modified these rules to permit AM-FM combinations and provided that all applications involving common ownership of UHF and radio stations would be treated on a case-by-case method.[17] Meanwhile, in 1970, the Further Notice of Proposed Rulemaking contained a proposal that would require divestiture within five years to reduce a party's holdings in any market to either a TV station, an AM-FM combination, or one or more daily newspapers.[18] The Second Report prohibited prospectively the establishment of the ownership patterns presented in the Further Notice. In addition, in seven markets where the only TV station and the only newspaper were jointly owned, and in nine markets where there was no television station and the only AM station and the only daily newspaper were jointly owned, the Second Report called for divestiture within five years. However, waivers would be considered.[19]

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[14] 47 C.F.R. § 76.636(a)(2) (1977):

> No such license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder officer or, director of such a part, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service in the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

[15] 33 Fed. Reg. 5,315 (1968).

[16] 22 F.C.C.2d 306 (1970).

[17] 28 F.C.C.2d 662 (1971).

[18] 22 F.C.C.2d 339 (1970).

[19] Second Report, *supra* note 2, at 1089.

The one-to-a-market rule had its foundation in the duopoly rule, which resulted from the Chain Broadcast Regulations of 1941.[20] The Chain Broadcast Regulations established new rules for the network-station relationship. Of particular importance was the requirement that no party could own two of the same type of license in the same market. Although there were other parties who owned two licenses for the same service in a given market, this requirement was directed at the National Broadcasting Company.[21] At that time, NBC had two of the three major radio networks.[22]

Since the Radio Act of 1927[23] established effective licensing of radio stations, the federal government has allocated licenses through comparative hearings. The reason for these hearings was the supposed scarcity of the electromagnetic spectrum.[24] Even before the formalization of the duopoly rule with its emphasis on diversity, the FCC had pursued a policy of encouraging as many voices in a community as possible. One of the biggest conflicts involved local newspaper applications for a radio license. Although the FCC did not exclude newspapers from consideration, it did view them in a slightly negative light. Most of the time, a newspaper could overcome this bias by showing that the radio station would be operated separately from the newspaper.[25] The most significant diversity case prior to the duopoly rules was *Port Huron Broadcasting Company*,[26] where a non-newspaper applicant was selected over a local newspaper applicant. It is not a strong opinion, but it supports the value of a new medium for the dissemination of news and information. Here we have a preview of a policy that continues to this date. The FCC strongly encourages newspaper-radio or TV combinations to divorce their newspaper operations from their radio or TV operations. Implicit is the fact that additional viewpoints and programs are available at no additional cost. However, that is not true. In a small town a small radio station may not have the resources to produce any news of its own. If the radio station was operated in combination with the local newspaper, it could use the newspaper's resources to produce a unique viewpoint. The combination would increase the incentives for the newspaper to gather more news because they would have a larger market for their information. Otherwise, the radio station will probably report the limited information that the newspaper has collected and published by using that as the basis for its local newscasts. The quantity of radio news is reduced, and diversity is reduced rather than strengthened.[27]

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[20] F.C.C. ANN. REP. 7 (1941).

[21] NBC challenged these regulations, but the Supreme Court sustained the Commission decision. NBC v. United States, 319 U.S. 190 (1943). NBC then sold half of its stations, including stations in each of the markets in which it had two, to Edward Noble, the Lifesaver king, who called the new network the American Broadcasting Company. The third major radio network was the Columbia Broadcasting System.

[22] Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COM. B.J. 4 (1974) [hereinafter cited as Howard].

[23] 44 Stat. 116 (1927).

[24] The scarcity argument was very weak even in 1942. At 10 kilocycle intervals on the AM spectrum between 540 and 1600 kilocycles, there are 107 potential channels for stations. To prevent interference from stations that have adjacent frequencies, the FCC requires 3 empty channels between stations. Therefore, a market could have as many as 27 different stations on the current AM spectrum. In 1940, FM stations were assigned to 42-50 megacycles (1 megacycle = 1,000 kilocycles). Therefore, 27 stations were possible on little over 1 megacycle and 8 megacycles had been allocated to FM. The higher frequency range produced a shorter range for a signal for the same power, but it would have been more than adequate for providing more than 100 signals for each urban area. Meanwhile, the 540-1600 kilocycles band could be used for higher power transmitters to cover the rural areas. In the 1930s, WLW-Cincinnati used 500,000 watts to cover most of the Midwest but it was eventually forced to go back to 50,000 watts. BARNOUW, THE GOLDEN WEB at 133 (1968). In 1945 FM was moved to 88-108 kilocycles where there were 100 channels 200 kilocycles wide. Between AM and FM there is no significant scarcity of broadcast radio frequencies today.

A similar pattern of artificial scarcity exists for television channels. The VHF spectrum which permitted 13 channels allowed for seven channels per market so long as one market was not too close to another. In 1952 when the UHF spectrum was allocated, seventy new channels were created. With one channel vacant between allocated channels, there were 43 potential channels per market. It would appear that it was the FCC, rather than the spectrum, that created scarcity.

With the exception of the duopoly rule, there were no new formal rules on a local diversity until 1970. The FCC continued to treat the possession of media ownership in the same market as a negative attribute in comparative hearings.[28] Starting in the 1940s, the important comparative hearing shifted from radio licenses to TV licenses. World War II ended with nine commercial TV stations licensed.[29] This number grew to 108 by 1948.[30] However, since the TV industry lost $15 million that year, the value of a TV license was in doubt. At that point, the issuing of new licenses was frozen for four years. The freeze ended with the release of the Sixth Report and Order which was effective on

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[25] For a discussion and extensive footnotes, *see* Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 Fed. Com. B.J. 44, 45 (1966).

[26] 5 F.C.C. 117 (1938).

[27] Albuquerque, New Mexico, for example, has 19 radio stations only three of which have reporters outside the station. On the other 16, reporters rely on either the wire services of the published versions of the two local newspapers. If either of the two local newspapers were permitted to purchase one of the 16 stations without outside reporters, it is difficult to believe that the diversity of actual viewpoints would not increase.

[28] Howard, *supra* note 22, at 19.

[29] Historical Statistics of the U.S. Colonial Times to 1970, at 796 (Bicentennial Ed. 1975).

[30] *Id.* at 798.

July 1, 1952.[31] In that year the TV industry made profits of $56 million. A TV license had obviously become a valuable commodity.

Confronted with numerous applications for licenses, the FCC developed some informal criteria which emphasized the factors of the diversification of media ownership, local ownership in the daily operation, and previous broadcasting experience.[32] These procedures were relatively ineffective in increasing even nominal diversity of viewpoints and programming. First, under the McFarland Act passed by Congress in 1952, transferees were considered as if they were the sole applicants.[33] Therefore, an "attractive applicant" could acquire a license in a comparative hearing. If he then sells the license to another party, that party's record or other holdings have to be very offensive before the FCC will deny the transfer.[34] Second, except in the case of WHDH,[35] no incumbent commercial station with a record "within the balance of average performance"[36] has ever had its license denied on renewal.[37] Therefore, an applicant with the preferred credentials could make promises during a comparative hearing knowing that the standard by which he will have to live is going to be fairly low.[38]

The bias against newspapers in the name of diversity was challenged in the courts by McClatchy Broadcasting Company.[39] In an initial hearing on the license of a TV station in Sacramento, California, the FCC's examiner found McClatchy to be superior in all respects except diversity of ownership, and awarded the license to McClatchy. The FCC reversed that decision and McClatchy appealed to the U.S. Court of Appeals,[40] which upheld the right of the FCC to establish its own criteria for awarding licenses in comparative hearings.[41]

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[31] Report and Order, 41 F.C.C. 148 (1952).

[32] Irion, *F.C.C. Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479 (1959).

[33] 47 U.S.C. § 310(b) (1970).

[34] *See* Watkins, *Diversity_Ownership in Broadcasting: Affirmative Policy in Search of an Author*, 27 U. FLA. L. REV. 502, note 119 (1975) for a discussion of what is probably a common situation.

An example of the inequitable result of this statutory approach is found in Aladdin Radio & Television, 10 P & F RADIO REG 773. (1954). After a long and close comparative proceeding between Aladdin, Inc. and Denver Television, a Denver TV license was awarded to Aladdin on the basis of its broadcast experience (it owned AM and FM stations in Denver) and local ownership (58% of Aladdin was locally owned, compared to Denver's 51%). The FCC did not think it relevant that Aladdin not only owned broadcast stations in Denver, but also a number of other Colorado stations (Aladdin Radio & Television, Inc., 9 P & F RADIO REG. 1, 4–19). Barely four months after it had been awarded the license, Aladdin applied to transfer its license to Time, Inc. Although Denver intervened, under the provisions of the 1952 amendment it could not be compared, favorably or otherwise, with Time, Inc. Since the Commission found no evidence of fraud in the previous proceeding, it awarded the license to Time, Inc. finding that it would not render service inferior to that of Aladdin. 10 P & F RADIO REG. at 772–75.

[35] And even in that case, there were some inproprieties during the application process and WHDH never had clear rights to the license. WHDH, Inc., 16 F.C.C.2d 1 (1969); Greater Boston Television Corp. v. F.C.C., 44 F.2d. 841 (D.C. Cir. 1970).

[36] *Id.* at 10–11.

[37] Renewal is required every three years. 47 C.F.R. § 76.630 (1977).

[38] This policy was established in Hearst Radio, Inc., 15 F.C.C. 1149 (1951).

[39] McClatchy Broadcasting Company, 19 F.C.C. 343 (1954).

Finally, in 1962, the Commission adopted a rule that a party who holds a license for less than three years is subject to an automatic hearing.[42] This did not stop transfers, it just slowed them down. Because the FCC did not accept the economic reality, they were effectively giving away a very valuable asset. Meanwhile, their local diversity policies were being circumvented in the market place. The parties that end up with the licenses tend to be the ones that can operate the stations most profitably. There are very few areas where there is a television monopoly. Profitability in markets where viewers have options represents the ability of the management to efficiently generate large audiences by giving these viewers the programming that they prefer. In short, the FCC's initial allocation of licenses has been inefficient, but it would be more inefficient if it had been any more effective.

With subtle pressure from Congress and the Department of Justice, the FCC in 1968 started to consider making stricter rules for local diversity.[43] By a unanimous decision the commission proposed to prospectively limit broadcast licenses to one full-time station of any type in each market.[44] The announced purpose of this proposed amendment was to promote diversity in the viewpoints expressed over the air in individual localities. In 1970 the FCC adopted rules which expanded the concept of the duopoly rule by extending the prohibition of ownership of two stations to all three areas (AM, FM and TV) in the same market.[45] The prohibition was prospective.

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[40] McClatchy Broadcasting Company v. FCC, 239 F.2d 15 (D.C. Cir. 1956).

[41] The winning applicant for Channel Ten was Sacramento Telecasters, Inc. In their application for the channel in 1954, Sacramento Telecasters gave $715,000 as their cost of construction. 19 F.C.C. 343, 348 (1954). In 1958, they sold the channel license for $4.5 million. In 1964, McClatchy bought KOVR, Channel 13, Stockton-Sacramento, CA for $7.8 million. This example raises serious questions about the FCC's license-issuing procedures. The winning applicant made a nice profit, while the unsuccessful applicant still accomplishes his initial goal, just at a much higher cost. Society would have been better off if there had been an auction in the first place. Then the value of the scarce television license would have gone to society rather than to the successful applicant.

[42] Report and Order, 32 F.C.C. 689 (1962).

[43] Howard, *supra* note 22, at 56.

[44] 33 Fed. Reg. 5315 (1968).

[45] First Report and Order, 22 F.C.C.2d 306 (1970).

This order was eventually amended to permit AM-FM combinations generally and AM-UHF TV combinations on a case-by-case basis.[46] This hearing process culminated in the Second Report[47] which added local daily newspapers to the one-to-a-market prohibitions presented in the First Report. The Second Report was challenged by the National Citizens Committee for Broadcasting, the Justice Department, and various media interests.[48] The National Citizens Committee for Broadcasting felt that the FCC decision did not go far enough, while the American Newspaper Publishers Association felt that it went too far. The Court of Appeals remanded the case because the grandfathering of existing combinations was viewed as being arbitrary. The case was appealed to the Supreme Court which upheld the Second Report.[49]

THE SECOND REPORT

Since viewpoints and programming are economic goods, the Second Report's rules will be counterproductive in creating true diversity. Because the FCC assumes that viewpoints and programs are free goods, they make the statement that "the thrust of recent rule changes in the area of multiple ownership as well as the underlying principles go in the direction of increasing diversity."[50]

The flaw in their thinking is elementary. Newspaper ownership is analyzed in two contexts: first, economic consequcnces[51] and, second, diversity of program and service viewpoints.[52] The economic consequences deal only with antitrust problems. Diversity is viewed as not being an economic problem. It is implied that no costs are involved in the production of diversity. In the course of the Commission's discussions, three arguments are mentioned as to why newspapers do not make such bad owners of TV stations: professionalism, separate management due to the different technologies, and the existing variety of mass media sources. No mention is made of the fact that well-run TV stations are profitable. A newspaper and a TV station possess an important complementary relationship, especially in the production of local news and public affairs. In fact, while being so concerned about viewpoints and programming, the Commission never focuses on the programming the owners can significantly control. In 1974, 88% of the television stations in the United States were network affiliated.[53] Although the stations have the right to reject network programs,[54] few stations exercise that right because viewers tend to prefer network programming. Therefore, in a vast majority of TV stations the ownership only controls local news and public affairs. The fact that newspapers and TV stations, as well as other local combinations, possess complementary relationships is not with respect to a small part of their programming, but rather with respect to the only major programming over which the ownership has any significant control.

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[46] Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971).

[47] 50 F.C.C.2d 1046 (1975).

[48] National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

[49] FCC v. National Citizens Committee for Broadcasting, ___ U.S. ___, 98 S. Ct. 2096 (1978).

[50] SECOND REPORT, *supra* note 2, at 1075.

[51] *Id.* at 1056.

[52] *Id.* at 1059.

Even without the Fairness Doctrine[55] and renewal hearings every three years,[56] the profit motive would limit the temptation for biased news reporting. Middle-of-the-road newscasts appeal to the largest, and therefore the most profitable, audience.[57] Biased news can only be presented at a substantial cost to the owner. A reading of the FCC

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[53] F.C.C., ANN. REP. 41 (1975).

[54] 47 C.F.R. § 73.658 (e) (1977).

[55] 13 F.C.C. 1246 (1940).

[56] 47 C.F.R. § 76.630 (1977).

[57] A typical example is given in NOLL, PECK, and MCGOWAN, *supra* note 7, at 50. A society with 450 people consists of four groups, three of which prefer specialty television programming, but many of whom will watch mass-audience programs if their preferred programs are not offered. The table below illustrates this situation.

NUMBER OF VIEWERS WATCHING PARTICULAR
PROGRAM IN GIVEN TIME SLOT

	PROGRAM PREFERENCE GROUPS			
PROGRAM TYPE	I	II	III	IV
SPECIALTY A	101	0	0	0
SPECIALTY B	0	100	0	0
SPECIALTY C	0	0	99	0
MASS-AUDIENCE, M	60	60	60	150

All 101 members of Group I, for example, would watch Specialty A programming if it were offered. However, if mass audience programming is offered in place of Specialty A programming, 60 will still watch television. Therefore, if there is only one station, it would maximize its audience by presenting mass-audience programming which attracts 330 viewers. A second station would maximize its audience by duplicating the types of programs offered by the first station and, in principle, it would attract 165 viewers. The same types of programs would be shown by a third station which would attract 110 viewers, which is still better than the best specialty alternative, which is 101 viewers. Only with the arrival of a fourth station will there be an incentive for specialty programming. That station would face the alternative of 82.5 viewers by duplicating the existing programming, versus 101 viewers by producing Specialty A. Therefore, it would choose to broadcast specialty programming. Although programming is presented generally in this example, the same analysis would be appropriate for middle-of-the-road versus biased newscasts.

Second Report leaves one with the impression that newspapers and television stations are charities rather than businesses.

When economies of scale are discussed,[58] the argument is rejected because of a lack of empirical evidence. The theoretical presence of economies of scale is so obvious as to be almost undebatable. The only relevant question is, "How much?" Later when studies are cited, the wrong questions are asked. The Commission's own study is presented in Appendix C of the Second Report.[59] A regression study is presented in which minutes of program categories broadcast is the dependent variable. The newspaper-owned stations in 1973 fared moderately well, presenting 6 percent more local news, 9 percent more local non-entertainment, and 12 percent more total local programming, including entertainment, than other TV stations. The differences are statistically significant, but the Commission still proceeded to adopt the Second Report.

In fact, we would expect the complementary relationship to be reflected in better local news programming, not necessarily longer programs. In no case does the Commission consider studies showing the relationship between the ownership patterns and the popularity of their local news offerings. A recent study[60] demonstrates that the Nielsen ratings of the local news produced by group and newspaper-owned stations are significantly greater than the other stations. A reduction in the number of local media combinations would reduce social welfare because their complementary relationship would be destroyed. The viewers prefer a few good viewpoints backed up by substantial resources rather than a multitude of mediocre ones backed up by limited resources. With only limited resources, "voices" become echoes rather than truly unique viewpoints.

THE SEVEN-SEVEN-SEVEN RULE

The FCC has attempted to increase the national diversity in television viewpoints and programming by limiting the number of stations that one party can license to seven of which only five can be VHF. Restrictions on the number of TV licenses controlled by one party were initiated in 1940 when the maximum number of experimental TV stations was set at three in Rule 4.77, which is now section 73.636.[61] That number was increased to five in 1944.[62] All these stations were on the VHF band because it was the only one available at that time.

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[58] Second Report, *supra* note 2, at 1063.

[59] *Id.* at 1094.

[60] Parkman, The Effects of Television Station Ownership on the Popularity of Local Television News, (1978) (unpublished manuscript).

[61] 47 C.F.R. § 76.636 (1977).

The issue of the maximum number of licenses owned by one party was addressed again when the UHF channels were established in 1952. As with local diversity, the Commission expressed its opinion that national diversity was in the society's best interest. "It is our view that the operation of broadcast stations by a large number of diversified licensees will better serve the public interest than the operation of broadcast stations by small and limited groups of licensees."[63]

With the availability of the seventy UHF channels, the total number of television channels was increased substantially. However, the Commission did not modify the existing rule that each party could own no more than five licenses. In 1954 it adopted rules that amended the earlier rules to permit the ownership of seven licenses so long as only five were VHF.[64] At this point, the Seven-Seven-Seven Rule was established in a form which still exists today. By permitting group owners to expand by acquiring two UHF licenses, the FCC hoped to aid that new service.[65]

Just as the local diversity rules reduce true local diversity because the FCC ignores the complementary relationships that exist within local combinations, the national diversity rules reduce true national diversity because the FCC ignores the economic structure of the national production of viewpoints and programs. With the exception of local news and public affairs, the number of different viewpoints and programs that exists on American television is a function of the networks rather than the ownership of the individual stations.

The FCC does not have direct control over the networks. In the middle of the 1950s, the FCC made an investigation of the networks called the Broadcast Network Study.[66] One of its recommendations called for the Communications Act of 1934[67] to be amended to give the FCC regulatory power over the networks.[68] This recommendation was never enacted.

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[62] 9 Fed. Reg. 5,442 (1944).

[63] Report and Order, 18 F.C.C. 288 (1953).

[64] Report and Order, 43 F.C.C. 2797 (1954).

[65] The major groups however have not been attracted by this alternative. Although the networks have owned UHF stations in the past, NBC, CBS and ABC do not now own any UHF licenses.

[66] F.C.C., NETWORK BROADCASTING: REPORT OF THE NETWORK STUDY STAFF TO THE NETWORK STUDY COMMITTEE (1958).

[67] 48 Stat. 1064 (1934).

[68] In July 1978, when the FCC wanted to penalize the CBS Television Network for a misleading tennis promotion, its only mechanism was through a decision to restrict the renewal of the next CBS-owned station that comes up for a renewal to a less than normal period. Wall Street Journal, July 19, 1978, at 12.

Indirectly, through its national diversity rules, the FCC has had a significant influence on the network structure in this country. The production of a television program basically represents a fixed cost no matter how many people see it. The larger the audience that views a program, the smaller the cost per viewer. Therefore, an exhibitor who can provide a large audience can charge advertisers a smaller fee per viewer and still cover his costs for a given program. By negotiating with a guaranteed market, the networks can provide a producer with a larger profit for a given program than is available to him from negotiating with separate stations in the individual markets. Therefore, the networks, rather than the individual owners, dominate programming.

Because of varied tastes, there is room in the United States for more than one network. The three that currently exist is an arbitrary number. All three of the current television networks had been established by 1927 as radio networks.[69] Even in the radio era the FCC had a tendency to pick non-group applicants in comparative hearings.[70] Although they did not have any rules on AM radio ownership until 1953, the FCC became more resistant as the number of licenses held by an applicant increased. Prior to the 1953 rules, the precedent for the maximum of seven radio licenses had been established by the KQW case[71] in which CBS was denied a transfer of a radio license that would have been its eighth.

If a network exists in either radio or TV, a new network has significant entry problems. The remaining independent stations are surviving by providing their own programming of reruns, syndicated programs and movies. The independent stations are unwilling to commit themselves to the newcomer until they have some evidence that he is going to survive. One method of providing evidence of the ability to survive is to present a schedule of programs. However, if the new network controls only a few stations its revenues will be so limited relative to its costs that it will go bankrupt before it can collect enough affiliates to reduce its cost per viewer to a competitive level. Because potential new networks were limited to the ownership of seven stations, the risks of starting a new network in radio were so great that only Mutual made the attempt on a national basis, and it was not particularly successful.

With the advent of the television era, the NBC, CBS, and ABC radio affiliations gave these radio networks a headstart on establishing television networks. In 1956 the NBC, CBS and ABC owned TV stations covered 23 percent, 20 percent and 19 percent of the U.S. population, respectively.[72] For another network to be viable, it had to have a guaranteed audience at least that big, if not bigger. The only attempt to compete was made by the Dumont Television Network which at one point owned part or all of five stations.[73] However, it was not able to get its programs to a large enough audience to compete with existing networks. In 1953, when the FCC allocated four or more stations to only six of the top twenty-five markets, Dumont's fate was sealed and they went out of business in 1955.[74] At the present time, the possibility for an additional network and substantial increase in viewpoints and programs in the United States is effectively prohibited by the seven-seven-seven rule and the allocation system of the FCC. If a potential network could hold more than seven licenses, it might be viable. To attempt network programming with only seven guaranteed outlets would be financial suicide. In addition, the VHF TV spectrum of 12 channels permits a maximum of seven stations in a market, while the UHF spectrum of 70 channels would permit another 35 if there were one blank channel between each license. If the FCC made a more realistic outlet allocation of channels,[75] it could substantially increase the number of markets with more than three channels.[76]

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[69] In that year NBC had the Red and Blue Networks and CBS had just started. The Blue Network was sold in 1943 to create ABC.

[70] Barnouw, *supra* note 24, at 221.

[71] Sherwood B. Brunton, 11 F.C.C. 407 (1946).

An additional reason for the FCC to encourage group ownership is based on the legal structure of group ownership. A group is more likely to be a corporation than a single license owner. A corporation is less likely to have incentives for biased programming. A privately owned station may be willing to sacrifice profits by presenting biased news that attracts less than the optimum number of viewers. Meanwhile, the shareholders of a corporation are only interested in the income that their shares will produce. They will exert pressure on the group's management to produce programming that maximizes profits. For news as well as other types of programming, the profit maximizing mix takes a middle-of-the-road position. Although many commentators are unhappy with this situation with regard to entertainment, it is a protection in the area of news.

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[72] Hansen, *Broadcasting and the Antitrust Laws*, 22 LAW & CONTEMP. PROB. 581 (1957).

[73] Bochen, *The Rise and Fall of the Dumont Network*, AMERICAN BROADCASTING 191 (Lichy and Topping, eds. 1975).

[74] *Id.* at 192.

[75] The current allocation of VHF channels is unrealistic. For example, Albuquerque, New Mexico, the eightieth biggest television market in this country, was allocated three commercial VFH channels. Santa Fe, New Mexico, with a current population of less than 75,000 and covered by the Grade A signal of the Albuquerque stations, was also allocated three commercial channels. None of the three Santa Fe VHF channels are currently on the air.

[76] NOLL, PECK, and MCGOWAN, *supra* note 7, at 99–108.

CONCLUSION

Society benefits from a variety of viewpoints and programs on television. However, the value of additional viewpoints and programs declines while their costs increase. At some finite number, the incremental costs of additional viewpoints and programs exceed the incremental benefits. Because the FCC has been reluctant to take a realistic look at the economic structure of television industry, it has generally ended up with rules that generate less true diversity than if the rules did not exist at all. Locally, by limiting future combinations while discouraging existing combinations, they reduce the number of truly different voices in local news, the only popular programs controlled by the owners. Nationally, by imposing limits on the number of stations that can be controlled by one party and by inefficiently allocating the existing channels, they reduce the possibility of another network being created. More networks would create additional diversity in programming, an area over which individual owners have very little control.

Morality and Broadcasting: FCC Control of "Indecent" Material Following *Pacifica**

INTRODUCTION

In a five-to-four decision on July 3, 1978, the Supreme Court upheld the Federal Communications Commission's (FCC) censure of a radio station for the intentional and repetitive daytime broadcast of seven "Filthy Words." The Court in *Federal Communications Commission v. Pacifica Foundation*[1] held for the first time that the FCC can regulate a radio broadcast that is indecent, although not constitutionally obscene. However, the Court provided no guidance on what material will be considered to be "indecent," and expressly refused to review the definition of indecency which the FCC had promulgated in its original order.

The decision was a departure from past Supreme Court opinions which had held that, because of first amendment considerations, speech in other non-broadcast contexts must be obscene in order to be banned. These prior decisions had concentrated on distinguishing obscenity from sexually oriented but constitutionally protected materials. They had developed a fairly restrictive test which had to be satisfied before the words could be declared obscene, and thus outside the protection of the first amendment and censurable.

While the obscenity standards thus enunciated did not solve all the problems associated with government censorship of morally objectionable material, they at least provided a constitutional framework for decision-making, and served to give speakers, publishers, moviemakers and others "fair notice" of what material would be considered "obscene." With *Pacifica*, however, the Supreme Court has created a new class of censur-

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[1] FCC v. Pacifica Foundation, 98 S. Ct. 3026 (1978) [hereinafter cited as Pacifica-U.S.].

able material—"indecent" broadcasts—but has given no indication of what standards are appropriate to judge such material. The Court has left to the FCC the task of determining which material is suitable for broadcast and which is not. The Commission, however, has indicated that it will not establish standards, but will instead decide each case on an *ad hoc* basis.

The chilling effect on broadcasters caused by this lack of standards is predictable. Licensees who must petition the Commission every three years for renewal of their commercially valuable licenses will be reluctant to jeopardize that economic advantage through broadcast of marginal material which may *ex post facto* be determined by that same body to be unsuitable for the public airwaves. The lack of standards could thus become an effective Commission lever over the policies and operations of broadcast management to deter presentation of controversial—albeit constitutionally protected—material.

This Comment will analyze the Court's *Pacifica* decision in light of the FCC's original order and the Court of Appeals opinion in an effort to define the scope of censorship permitted by the Supreme Court. Additionally, standards applied to morally objectionable material in other contexts will be examined to determine if they are applicable to indecent broadcasts. Finally, having concluded that few meaningful standards remain relevant to this new class of censurable material, the Comment will propose that standards be established through the FCC's rulemaking process to provide broadcasters a measure of certainty as to what material is suitable for airing.

I. THE HISTORY OF *PACIFICA*

This section will examine the factual setting of *Pacifica*, and outline the decisions of the FCC, the Court of Appeals for the District of Columbia, and the Supreme Court.

A. *The Factual Setting of the Case*

An understanding of the circumstances of the *Pacifica* broadcast is important to an understanding of the decision, since the Court emphasized that the holding is confined to the monologue "as broadcast."[2] At two o'clock in the afternoon, WBAI, a noncommercial radio station, broadcast, as part of a general discussion of contemporary society's attitudes toward language, a satirical monologue by comedian George Carlin entitled "Filthy Words."[3] Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in fifteen minutes. In the recording Carlin named and discussed seven "words you couldn't say on the public airwaves, the ones you definitely wouldn't say, ever."[4] Following a complaint[5] by a single listener,[6] the FCC issued a declaratory order granting the complaint.[7]

The Commission held that use of these words, while children are likely to be in the radio or television audience, is "indecent" regardless of context, and thus censurable. While not imposing a penalty from its arsenal of sanctions,[8] the FCC stated that the order would be "associated with the station's license file," to be reconsidered should any subsequent complaints be received.[9]

In its memorandum opinion, the FCC sought to clarify the standards it would use in judging "the increasing number of complaints" it had received regarding "indecent" material on the airwaves[10] stating that:

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[2] *Id.* at 3033.

[3] "George Carlin, Occupation: Foole," Little David Records, recorded live at the Circle Star Theater, San Carlos, California. The segment of the record broadcast was Cut 5 of Side 2, titled "Filthy Words" which ran 11 minutes and 45 seconds.

[4] The words used by Carlin are: "shit, piss, fuck, cunt, cocksucker, motherfucker and tits." A transcript of the monologue is appended to the Court's decision. Pacifica-U.S., *supra* note 1, at 3041.

[5] It is the Commission's practice to forward all listener complaints to station management with a request for its comments. The management is informed that the complaint and the station's response will become part of the licensee's renewal file. See Note, *Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 606 (1975).

[6] The complainant was a man who had heard the broadcast while driving with his young son. *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM) New York, N.Y., Memorandum Opinion and Order, 56 F.C.C. 2d 94, 95, 32 R.R. 2d 1331, 1332 (1975) [hereinafter cited as Pacifica-FCC].

[7] *Id.*

[8] The FCC may: first, revoke a station license, 47 U.S.C. § 312(a)(6) (1970); second, issue a cease and desist order, *id.* § 312(b)(2); third, impose up to a $1,000 fine for broadcast of obscene, indecent or profane material, *id.* § 503(b)(1)(E); fourth, deny license renewal, *id.* at § 307; or fifth, grant a short-term renewal, *id.*

[9] Pacifica-FCC, *supra* note 6, at 99, 32 R.R.2d at 1337.

> the concept of "indecent" is intimately connected with exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[11]

The Commission distinguished "indecent" language from constitutionally unprotected "obscene" language in that the former: 1) lacks the element of appeal to the prurient interest, and 2) cannot be redeemed by a claim that it has literary, artistic, political or scientific value when children are in the audience.[12] The Commission noted that when children were not in the audience it would consider a licensee's claim that the proscribed material had redeeming social value, but emphasized that the broadcaster would still be required to make "substantial and solid efforts"[13] to warn unconsenting adults. In stating that it was not establishing an outright ban on this objectionable material, the FCC analogized its action to public nuisance law, which generally speaks of channeling certain behavior, rather than prohibiting it altogether.[14]

To support this more restrictive regulation of material disseminated over radio and television, the Commission asserted that the broadcast medium has special qualities which distinguish it from the other modes of communication:

> Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.[15]

The Commission issued a second *Memorandum Opinion*

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[10] *Id.* at 94, 32 R.R. 2d at 1331.

[11] *Id.* at 98, 32 R.R. 2d at 1336.

[12] *Id.* The current constitutional standard for judging language "obscene," and as such unprotected by first amendment guarantees of free speech, is set out in Miller v. Cal., 413 U.S. 15 (1973). The *Miller* standard is discussed at text accompanying note 50 *infra*.

[13] Pacifica-FCC *supra* note 6, at 100, 32 R.R. 2d, at 1338.

[14] *Id.* at 98, 32 R.R.2d at 1336.

[15] *Id.* at 97, 32 R.R.2d at 1335.

208

and Order[16] in the WBAI case over a year later, stating that it never intended to place an absolute ban on the broadcast of indecent language, but sought only to channel it to times of the day when children would least likely be exposed to it.[17] Attempting to narrow the scope of its original *Order*, the Commission ruled that indecent language could be used in a news or public affairs program or otherwise if aired at a time when children were less likely to be in the audience, provided there was adequate warning and provided the program had redeeming social value.[18]

B. *Court of Appeals Review*

In reversing the FCC's original *Order*, the Circuit Court of Appeals for the District of Columbia found the Commission had violated its duty to avoid censorship of broadcast communication. Additionally, the court determined that, even assuming *arguendo* that the Commission may regulate non-obscene speech, the *Order* was overbroad and vague in the following respects: every use of the seven words cannot be deemed offensive even as to minors; the *Order* failed to define "children"; the radio audience is not so captive that the set cannot be turned off; and in preventing distribution to children, the *Order* effectively denied consenting adults access as well.[19]

The opinion of the court was delivered by Circuit Judge Tamm and joined in by Chief Judge Bazelon. A separate concurring opinion was delivered by Judge Bazelon in which he expressed the view that the *Order* violated the first amendment, as well as the no-censorship provision of section 326 of the Communications Act of 1934.[20] Additionally, Judge Bazelon analyzed and dismissed as non-compelling the characteristics urged by the Commission as justifying suppression of otherwise constitutionally protected material.[21]

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[16] *In re* "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, Station WBAI (FM), New York, N.Y., Memorandum Opinion and Order, 59 F.C.C.2d 892, 36 R.R.2d 1008 (1976) [hereinafter RTNDA Petition]. The *Order* was in response to a petition by the Radio Television News Directors Association (RTNDA) for "clarification or reconsideration" of the Pacifica order. In its petition, RTNDA sought a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as part of a bona fide news or public affairs program." *Id.* at 892. While the Commission observed in a footnote that it would be inequitable to hold a licensee responsible for indecent language broadcast *live* where no opportunity existed for editing, it refused to categorically rule that live broadcasts were outside its definition of indecent, and left open to question whether *recorded* news and public events were prohibited if they contained the offensive words. *Id.* at 893, n.1, 36 R.R.2d 1010, n.1.

[17] *Id.* at 892, 36 R.R.2d at 1008.

[18] *Id.* at 893, 36 R.R.2d at 1010. The Commission declined to discuss its original *Pacifica Order* further "in the absence of a concrete factual context."

[19] Pacifica v. FCC, 556 F.2d 9, 17 (D.C. Cir. 1977) [hereinafter cited as Pacifica-Appeals].

Addressing the Commission's children-in-the-audience rationale, Judge Bazelon conceded that the Supreme Court's decision in *Ginsberg v. New York*[22] allows the government greater control over speech aimed at children.[23] However, the concurrence noted that under the doctrine of *Butler v. Michigan*[24] such regulation is objectionable if its effect is to keep such material from adults entirely.[25] Judge Bazelon continued: "If the Commission finds it impractical to accommodate these interests, any regulation must err on the side of under- rather than over-regulation. Any harm from under-regulation may be minimized by pre-program warning and parental supervision. Any harm from over-regulation, on the other hand, is irremedial."[26]

In its original *Order*, the Commission had relied on *Rowan v. Post Office Department*[27] to support its prohibition of non-obscene speech from invading the privacy of the home. But, Judge Bazelon pointed out that *Rowan* establishes the location of the viewer as only one of several factors to be considered in a determination that speech is unprotected. Judge Bazelon stated that "although a person *can* claim a greater privacy interest when at home, that interest is reduced when he 'opens up his home' by turning on the radio."[28]

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[20] 47 U.S.C. § 326 (1970).

[21] Pacifica-Appeals, *supra* note 19, at 30.

[22] 390 U.S. 629 (1968) (material not obscene by adult standards may be treated as obscenity if sold to a child).

[23] Pacifica-Appeals, *supra* note 19, at 24.

[24] 352 U.S. 380 (1957).

[25] Pacifica-Appeals, *supra* note 19, at 27. Judge Bazelon stated that "Adults with normal sleeping habits will be limited to programs 'fit for children.'" *Id.*

[26] *Id.* at 27-28.

[27] 397 U.S. 728 (1970).

[28] Pacifica-Appeals, *supra* note 19, at 27. *See* Cohen v. Cal., 403 U.S. 15 (1971)(visitors to a county courthouse can "avert their eyes" to avoid being offended by the slogan "Fuck the Draft" on another person's jacket) and Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975)(where passers-by were offended by nude

The Commission had also argued that since the number of broadcast frequencies is physically limited, indecency over the airwaves must be prevented in order to avoid misuse of scarce resources. The FCC relied on *Red Lion Broadcasting Co. v. FCC*[29] to support the proposition that the scarce spectrum justifies stricter control of the broadcast media. Judge Bazelon, however, pointed out that *Red Lion* involved a question of *increasing* the diversity of broadcast options, and did not justify censorship of certain points of view or the use of certain language.[30]

C. *The Supreme Court's Decision*

The Supreme Court did not rule on the validity of the FCC's definition of "indecency," but instead limited the decision to a determination that the Carlin monologue was indecent "as broadcast."

In arriving at its decision, the Supreme Court considered two statutory questions: whether the FCC's action was "censorship" forbidden by section 326 of the Communications Act[31]; and whether speech that is not "obscene" may be restricted as "indecent" under section 1464 of the Communications Act.[32] Noting that the two statutes have a common origin in the Radio Act of 1927,[33] and thus that the former does not render the latter nugatory,[34] the Court determined that the anti-censorship statute is aimed only at prior restraint and does not limit the Commission's power to review the context of complete broadcasts and to impose sanctions on licensees who

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scenes on an outdoor movie screen, the Court refused to allow censorship of the movie, but instead stated that "the burden of avoiding exposure to objectionable material normally falls on the viewer").

[29] 395 U.S. 367 (1969).

[30] Pacifica-Appeals, *supra* note 19, at 29.

[31] 47 U.S.C. § 326 (1970) provides that: "Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over radio communications . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[32] 18 U.S.C. § 1464 (1970) makes it a criminal offense punishable by a fine of not more than $10,000 or imprisonment for not more than two years, or both, for anyone who "utters any obscene, indecent, or profane language by means of radio communication. . . ."

[33] Ch. 169, § 1, 44 Stat. 1162.

[34] Pacifica-U.S., *supra* note 1, at 3034.

engage in obscene, indecent or profane broadcasting.[35]

The second statute, section 1464, makes it a criminal offense to broadcast "obscene, indecent or profane" language. Since the Commission conceded that Carlin's language was not "obscene" and thus not censurable under the *Miller v. California* obscenity standards,[36] the question before the Court was whether language less than obscene, but nonetheless objectionable, could be proscribed.

While this particular section of the criminal code had never before received high court review, the Supreme Court had previously determined that similar disjunctive language in two companion sections must be read narrowly, so as to prohibit only "hard core," patently offensive material.[37] In *Pacifica*, however, the Court determined that indecent language—that is, language that would be obscene but for its lack of appeal to the prurient interest—was intended by Congress[38] to be kept off the public airwaves. Thus, such material could be banned by the FCC, even though it would be protected by the first amendment in other contexts.[39]

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[35] *Id.* at 3035. *See* KFKB Broadcasting Ass'n, Inc. v. FRC, 47 F.2d 670, 672 (D.C. Cir. 1931); Trinity Methodist Church, South v. FRC, 62 F.2d 850, 851 (D.C. Cir. 1932) which held that § 29 of the Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162, did not prohibit review of completed broadcasts. *See also* Bay State Beacon, Inc. v. FCC, 171 F.2d 826, 827 (D.C. Cir. 1948); Idaho Microwave, Inc. v. FCC, 352 F.2d 729, 733 (D.C. Cir. 1965) which likewise construed 47 U.S.C. § 327 (1970) as allowing post-broadcast review of "improper" programming. *Cf.* Anti-Defamation League of B'nai B'rith, Pac. S.W. Regional Office v. FCC, 403 F.2d 169 (D.C. Cir. 1968).

[36] *See* text accompanying note 50 *infra*.

[37] In United States v. 12 200 Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973), the Court, while not deciding the question, said:

> If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lacivious," "filthy," "indecent," or "immoral" as used to describe regulated material in . . . 18 U.S.C. § 1462, . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*.

Id. at 130 n.7. In Hambling v. United States, 418 U.S. 87, 113 (1974), the Court approved this language in connection with a vagueness attack on 18 U.S.C. § 1461, which prohibits the mailing of "obscene, lewd, lacivious, indecent, filthy or vile" material. In United States v. Simpson, 561 F.2d 53 (7th Cir. 1977), a federal court for the first time held that "obscene" and "indecent" in § 1464 are to be read as a single proscription. In reaching that conclusion, the court assumed that the Supreme Court would interpret "indecent in § 1464 as it has in [18 U.S.C.] § 1462." *Id.* at 60.

[38] The legislative history of § 1464 is silent as to what meaning Congress intended to convey with the words indecent and obscene. Section 1464 originated as § 29 of the Radio Act, ch. 169, § 1, 44 Stat. 1162, 1172-73, and was carried over to § 326 of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1091, without substantive change. With the overall revision and codification of Title 18, accom-

The Court relied on two distinctive qualities of the broadcast media as supporting this more restrictive view of the first amendment.[40] First, since broadcast media have established a uniquely pervasive presence in most American homes, the Court determined that an individual's right to privacy "plainly outweighs the first amendment rights of the intruder."[41] Second, since children have easy access to the media and the government has an interest in protecting the well-being of its youth, the Court found additional justification for this more restrictive treatment of indecent broadcasting.[42]

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plished by the Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 1464, 62 Stat. 683, 769, the last sentence of § 326 became the present 18 U.S.C. § 1464.

Curiously, in the absence of any legislative history regarding Congressional intent, the Supreme Court looked to the FCC's long-standing interpretation of the statute to determine that § 1464 encompasses more than the obscene. *See* Pacifica-U.S., *supra* note 1, at 3036 n.16.

[39] Pacifica-U.S., *supra* note 1, at 3036. The concurring opinion of Justice Powell noted that, because of first amendment considerations, Carlin could not be punished "for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance," and assumed that "an adult could not constitutionally be prohibited from purchasing a recording or transcript of the monologue and playing or reading it in the privacy of his own home." *Id.* at 3044.

[40] *Id.* at 3040.

[41] *Id.* Without extended analysis, the Court asserted:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Id. *See* Rowen v. Post Office Dept., 397 U.S. 728 (1970). The dissent of Justice Brennan argues that the Court's opinion misconceives the privacy interest of one who voluntarily brings radio communications into his home, and that it ignores the constitutional rights of those who wish to transmit and those who wish to receive broadcasts that some may find offensive. *Id.* at 3048-49 (Brennan, J., dissenting).

[42] *Id.* at 3040-41. *See* Ginsberg v. N.Y., 390 U.S. 629 (1968). Justice Brennan argues in dissent that *Ginsberg*, relied on by the Court as supporting stricter regulation of material available to children, does not allow government regulation which prevents youth's access to materials not obscene to them. Pacifica-U.S., *supra* note 1 at 3050 (Brennan, J., dissenting). Noting that the Carlin monologue does not appeal to the prurient interests even of children, Brennan objects that the effect of the Court's decision is to make "completely unavailable to adults material which may not [be] constitutionally kept even from children." *Id.*

II. WHAT MATERIAL IS CENSURABLE AS "INDECENT"?

The Supreme Court thus left the following question unanswered: since the Court refused to approve the Commission's definition of indecency, what material is now properly censurable by the FCC?

A. *Is Pacifica "Confined to its Facts"?*

In declining to review the Commission's broad definition of "indecency," the Supreme Court emphasized that its decision is limited to a determination that the Carlin monologue was indecent *as broadcast*.[43] Thus, when viewed from the factual context of the WBAI broadcast, the Court's holding is that *repetitive*, *deliberate* use of Carlin's *seven specific words* during an *afternoon broadcast* when *children are likely to be in the audience* is proscribed. However, there is language in the Court's opinion which would support a much broader ban. The cornerstone of the decision is that the words "indecent" and "obscene" as used in section 1464 have separate, distinct meanings. One facet of that distinction, the Court determined, is that prurient appeal is not an essential component of "indecent" language.[44] The Court's opinion, though, goes even further. It states that " 'indecent' merely refers to nonconformance with accepted standards of morality," and includes a footnote reference to the Webster's dictionary definition: "[A]ltogether unbecoming."[45] Such broad language, as the dissent of Justice Brennan notes, could provide a basis for imposing sanctions for broadcasting portions of the Bible.[46] While it may overstate the FCC's position to suggest that the Commission would attempt to ban Bible readings from the public airwaves, it is certainly plausible that the FCC's definition of indecency (issued in its opinion of the case), combined with the Court's language, could be used to keep literary works of classic and modern authors off the air during daytime and early evening hours.[47] And certainly, the Nixon tapes, heavily peppered as they are with the seven "Filthy Words" used by Carlin in another context, would be considered by some to be in "nonconformance with accepted standards of morality," and by most as "altogether unbecoming," and thus would be unsuitable for broadcast under the Court's broad definition of "indecency."[48]

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[43] *Id.* at 3032-33.

[44] *Id.* at 3036.

[45] *Id.* at 3035 n.14.

[46] *Id.* at 3052. Brennan points out that the two factors relied on by the majority—the intrusive nature of radio and the presence of children in the audience—are "plagued by a common failing: the lack of principled limits on their use for FCC censorship." He continues:

> [N]either of the opinions comprising the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communication the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context.

Id. at 3051. Brennan names works of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer as potentially proscribed from the airwaves. *Id.*

B. *Pre-*Pacifica *Standards*

Prior to the Supreme Court's *Pacifica* decision, lower courts faced with the question of what kinds of objectionable material broadcast over the airwaves could be banned had held that the only material properly censurable under Section 1464 was that determined to be "obscene."[49] The standard for obscenity was established by the Supreme Court in *Miller v. California*,[50] where it was held that to find speech unprotected because obscene, a court must decide:

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[47] *See id.* at 3052, (Brennan, J., dissenting). *See also*, Brief for Appellee Addendum, FCC v. Pacifica Foundation, 98 S. Ct. 3026 (1978).

[48] In the Petition for Clarification or Reconsideration filed by the Radio Television News Directors Association, RTNDA specifically noted that language contained in the Nixon tapes would be definable as "indecent" under the Commission's standards. RTNDA Petition, *supra* note 16, at 893.

[49] United States v. Simpson, 561 F.2d 53, 60 (7th Cir. 1977) (Simpson used his citizen's band radio to broadcast explicit references to sexual activities and organs. The Court of Appeals decided he was not properly convicted of violating 18 U.S.C. 1464 (1977) when the jury found his language was "indecent" but not "obscene."); Pacifica-Appeals, *supra* note 19. *See also*, Duncan v. United States, 48 F.2d 128 (9th Cir. 1931)(Duncan's broadcast speech named an individual as a "grafting thief" and said he was a "slick, thieving, grafting, dirty, cowardly scoundrel." The court equated the words "indecent" and "obscene" as used in the statutory predecessor of § 1464 and said this speech was not indecent since it did not "arouse lewd or lascivious thought" in the minds of the listener.

[50] 413 U.S. 15 (1973). In the landmark case of Roth v. United States, 354 U.S. 476 (1957), the Supreme Court held that the standard for judging obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to the prurient interest." Nine years later in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Mass., 383 U.S. 413 (1966), the Court added that material was condemnable only if "utterly without redeeming social value." Thus, the *Roth* and *Memoirs* deci-

> (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[51]

Thus, under *Miller*, morally objectionable material was protected unless it met six specific requirements:

(1) the work appealed to the prurient interest of the average person;
(2) the judgement of prurience was based on the work as a whole;
(3) the work was judged by contemporary state or local standards;
(4) the work affronted those community standards in a patently offensive way;
(5) the sexual conduct involved was specifically described either by the statute or by later judicial construction;
(6) the material as a whole lacked serious literary, artistic, political or scientific value.

Additionally, the Supreme Court decided that offensive language and conduct may be prohibited, even though it is protected under the *Miller* standards, if it falls within one of several exceptions to the obscenity definition: material commercially exploited for its sexual interest, even though it lacks

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sions established a very strict standard for obscenity—to be judged obscene, a work had to satisfy three criteria: (1) the dominant theme of the material taken as a whole must appeal to the prurient interest; (2) the material must be patently offensive in its affront to contemporary community standards; and (3) the material must be utterly without redeeming social value. Very few obscenity convictions withstood appeal under this restrictive test. *See* Note, *Obscenity from* Stanley *to* Karalexis: *A Back Door Approach to First Amendment Protections*, 23 VAND. L. REV. 369, 384 (1970).

In *Miller v. California*, the Supreme Court attempted to redefine obscenity. The principal holding of *Miller* was to substitute the "utterly without redeeming social value" test with a looser requirement that material may be found obscene if it "lacks serious literary, artistic, political or scientific value." In addition, to give fair notice of what is obscene, the Court required that an obscenity statute, either by its language or by judicial interpretation, specifically define the kinds of sexual acts which, if portrayed, could lead to a finding that material is obscene. The Court also altered the *Roth-Memoirs* definition of obscenity by defining the "community standard" in state and local terms, rejecting the national standard previously employed.

[51] 413 U.S. 15, 24 (1973).

prurient appeal,[52] material regulated because of the state's desire to protect children[53] and material which assaults individual privacy in the home.[54] The decisions establishing these exceptions, however, were made in non-broadcast contexts, and a strong argument exists that at least two of the exceptions were importantly modified as applied to the broadcast media.[55]

C. *Do Past FCC Decisions Provide Guidance?*

The FCC has consistently espoused the view that morally objectionable material, although protected by the first amendment in other contexts, may be properly censured if broadcast over radio or television. In its 1960 *Programming Policy Statement*,[56] the Commission asserted:

> We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. As we [have] stated . . . "radio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature. Thus, for example, while a nudist magazine may be within the protection of the first amendment the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464."[57]

In at least a dozen opinions since that enunciation of its policy, the Commission has sanctioned licensees for their broadcast of material not "obscene" under then-existing constitutional standards.[58]

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[52] Ginzberg v. United States, 383 U.S. 463 (1966). In this case, the Court affirmed a conviction for material which was not *per se* obscene, but which became so because it was commercially exploited for its sexual interest. Thus, even though material is not wholly obscene, it may lose its constitutional protection if it is "pandered" for sexual appeal.

[53] Ginsberg v. N.Y., 390 U.S. 629 (1968). This doctrine, though, must be read together with an earlier decision which held that in protecting children, the state may not submerge the rights of adults to receive non-obscene matter. Butler v. Mich., 352 U.S. 380 (1957). In his concurrence in Pacifica-Appeals, *supra* note 19, at 24, Judge Bazelon notes that since children are in the audience until the very late night hours, "protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep." *Id.* at 24 n.20.

[54] Rowan v. United States Post Office Dept., 397 U.S. 728 (1970). In his Pacifica concurrence, Court of Appeals Chief Judge Bazelon opined that Rowan did not support the protection of privacy exception in a broadcast context: "Although a person *can* claim a greater privacy interest when at home, that interest is reduced when he 'opens up his home' by turning on the radio." Pacifica-Appeals, *supra* note 19, at 26-27.

[55] *See supra* notes 53 and 54.

[56] Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303 (1960).

[57] *Id.* at 2307.

The Supreme Court, in deciding that section 1464 prohibits both "obscene" and "indecent" materials, relied heavily on the FCC's long interpretation of the section's scope as encompassing more than the obscene.[59] The Court referred specifically to four Commission decisions in which the agency had penalized stations for presentations falling far short of meeting the "hardcore" obscenity standard required by the Court in other contexts.[60] An examination of the standards announced by the FCC in two of those four cases may help define the contours of what material may be proscribed under the *Pacifica* decision in the future.

1. WUHY-FM[61]

In 1970, station WUHY, the Eastern Educational Radio noncommercial station in Philadelphia, aired an interview with a rock group leader who punctuated his comments on ecology, music and politics with numerous four-letter expletives.[62] The

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[58] *See, e.g.*, *In re* Revocation of License of Mile High Stations, Inc., Memorandum Opinion and Order, 28 F.C.C. 795, 20 R.R. 345 (1960)(offensive sound effects and disk jocky comments); *In re* Application of WREC Broadcasting Serv., Decision, 19 F.C.C. 1082, 10 R.R. 1323 (1955)(six songs in "less than good taste"); *In re* Applications of Palmetto Broadcasting Co., Decision, 33 F.C.C. 250, 251, 23 R.R. 483, 485 (1962) ("vulgar, suggestive materials susceptible of double meanings with indecent connotations"); *In re* Applications of Pacifica Foundation Station KPFA, Memorandum Opinion and Order, 36 F.C.C. 147, 1 R.R.2d 747 (1964) ("filthy" poems); United Fed'n of Teachers, WBAI-FM, 17 F.C.C.2d 204, 15 R.R.2d 1096 (1969) (allegedly anti-Semetic program); *In re* Petition by Oliver R. Grace, 22 F.C.C.2d 667, 18 R.R.2d 107 (1970) ("vulgarity" on television); *In re* Application of Jack Straw Memorial Foundation, 21 F.C.C.2d 833, 18 R.R.2d 414 (1971) (several uses of three unspecified four-letter words); Trustees of the U. of Pa. (WXPN), 57 F.C.C.2d 782 (1975)(obscenity during a radio call-in program).

[59] Pacifica-U.S., *supra* note 1.

[60] *Id.* at 3036, n.16.

[61] *In re* WUHY-FM, E. Educ. Radio, Notice of Apparent Liability, 24 F.C.C.2d 408, 18 R.R.2d 860 (1970).

[62] Examples of the language, set forth in the Opinion, are:

> S--t man.
> I must answer the phone 900 f----n' times a day, man.
> Right, and it sucks it right f-----g out of ya, man.
> That kind of s--t.
> It's f----n' rotten man. Every f----n' year.
> . . . this s--t.
> . . . and all that s--t--all that s--t.
> . . . so f-----g long.

Commission assessed a forfeiture for the use of "indecent" language. The standard under which the language was judged to be indecent was: "the material broadcast is (a) patently offensive by contemporary community standards, and (b) is utterly without redeeming social value."[63] The standard was consistent with the then prevailing definition of obscenity, with the exception that there was no requirement for appeal to the prurient interest.[64] However, although the Commission included the "contemporary community standards" yardstick, it neither discussed the selection of the community under whose standards it declared the work indecent, nor revealed how it ascertained that community's standards.[65]

Furthermore, the determination that the broadcast in the *WUHY* case was "utterly without redeeming social value" is suspect since the speaker was expressing views on political, social and artistic subjects. In *Cohen v. California*,[66] decided after *WUHY*, the Supreme Court determined that the government cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process,"[67] and held that the first amendment's free speech guarantee extends to a person wearing a jacket inscribed "Fuck the Draft" in a county courthouse. The danger noted by the Court in *Cohen* is that

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> Everybody knows everybody so f-----n well that . . . .
> S--t.
> S--t. I gotta get down there, man.
> All that s--t.
> Readily available every f-----g where.
> Any of that s--t either.
> Political change is so f-----g slow.

Id. at 409, 18 R.R.2d at 861.

[63] *Id.* at 412, 18 R.R.2d at 865.

[64] The then prevailing standard was the so-called *Roth-Memoirs* rule that, to be judged obscene, a work had to satisfy three criteria: (1) the dominant theme of the material taken as a whole must appeal to the prurient interest; (2) the material must be patently offensive in its affront to contemporary community standards; and (3) the material must be utterly without redeeming social value. The rule was derived from two landmark obscenity cases: Roth v. United States, 354 U.S. 476 (1957), and A Book Named "John Cleland's Memoirs of a Woman of Pleasure" *v.* Mass., 383 U.S. 413 (1966). *See* note 50 *supra*.

[65] Under the then prevailing *Roth-Memoirs* rule, the "community standard" was a national one. In Miller v. Cal., 413 U.S. 15 (1973), the Court altered *Roth-Memoirs* by defining the contemporary community standard in state and local terms. See note 50 *supra*.

[66] 403 U.S. 15 (1971).

[67] *Id.* at 26.

the manner of speech cannot be divorced from its underlying thought, so that if the underlying thought is protected, so too, is the manner of expression. Dissenting Commissioner Johnson voiced similar concerns in *WUHY*: "What the Commission condemns today are not words, but a culture--a lifestyle it fears because it does not understand."[68]

Insofar as the indecency standard announced in *WUHY* is parallel to that used by the FCC in *Pacifica*—that is, the then-prevailing obscenity standard, minus the prurient interest requirement—the two opinions appear consistent. The FCC's application of the standard in *WUHY*, however, seems deficient in that there was no apparent determination of the relevant community's standards, and thus no judgment that the broadcast was patently offensive to those standards. Additionally, the finding that the material as a whole lacked serious value is questionable in light of the later *Cohen* decision.

2. *Sonderling Broadcasting Corp.*[69]

During a radio call-in program, a talk show host in suburban Chicago elicited discussion from members of his audience regarding their sex lives.[70] The five-hour daytime program, called "Femme Forum," which then contained explicit sexual reference, was the top-rated program in the area.[71] The FCC, after reviewing portions of the program, found what it called "topless radio format" to be both obscene and indecent, and imposed a $2,000 forfeiture on the station.[72] In an appeal brought by a group of the station's listeners,[73] the Circuit Court of Appeals for the District of Columbia agreed with the Commission's determination that the program was obscene, and thus did not reach the indecency question.

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[68] WUHY-FM, E. Educ. Radio, Notice of Apparent Liability, 24 F.C.C.2d 408, 422, 18 R.R.2d, 860, 872 (1970).

[69] *In re* Apparent Liability of Station WGLD-FM, 41 F.C.C.2d 919, 27 R.R.2d 285 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

[70] The FCC specifically objected to programs aired on Feb. 21 and 23, 1973, which included discussions "about oral sex . . . [consisting] of explicit exchanges in which female callers spoke of their oral sex experiences." 41 F.C.C.2d at 919, 27 R.R.2d at 285-86.

[71] 41 F.C.C.2d at 924, 27 R.R.2d at 297. Sonderling was one of many licensees nation-wide to adopt this telephone call-in format in which sexual relations were explicitly discussed. *See* Note, 25 DRAKE L. REV. 257, 258 (1975). "These shows were apparently extremely popular but generated a number of listener complaints which came to the FCC directly or through members of Congress." *Id.*

[72] 41 F.C.C. 2d 919, 27 R.R.2d 285.

[73] Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). The licensee decided to pay the fine rather than take the issue to court be-

The indecency determination was based on *WUHY* as precedent and buttressed by the additional consideration that there were children in the audience. Although the FCC declared the dominant theme of the material to be obscene, the Commission did not discuss the content of the program beyond a few examples listed. Furthermore, as in *WUHY*, the decision failed to reveal the community standards by which it measured the offensiveness of the program or to discuss how those standards were ascertained. And, as the dissent points out, the Commission's label of "patently offensive by community standards" is "remarkable" in light of the program's top rating.[74]

The standard used by the Commission to judge this popular program was the same two-prong test established in *WUHY*: that the program was patently offensive as judged by community standards and utterly without redeeming social value. And, as in *WUHY*, while the test is acceptable, the FCC's application of it to the program under consideration was questionable.

D. *What Standards are Appropriate in a Broadcast "Indecency" Determination?*

In *WUHY* and *Sonderling*, the Commission defined indecency in terms of the Supreme Court's standard for obscenity,[75] minus the requirement of appeal to the prurient interest. Similarly, in *Pacifica*, the FCC distinguished its definition of broadcast indecency from the Court's definition of obscenity in that

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cause of the "tremendous financial burden involved." Letter of May 3, 1973, from Egmont Sonderling, Sonderling Broadcast Co., to FCC, *quoted in id.*, at 40. However, the Illinois Citizens Committee for Broadcasting and the Illinois Division of the American Civil Liberties Union filed a Petition for Reconsideration as representatives of the listening public. When the FCC refused to grant the relief, the groups sought review in the Court of Appeals. *Id.* at 397.

[74] 41 F.C.C.2d at 924, 27 R.R.2d at 297. It should be remembered that at the time of the *Sonderling* decision, the *Roth-Memoirs* rule was the applicable standard, under which the relevant community was a national one. In light of the widespread popularity of such formats, however, it is arguable that the program was not patently offensive even under this presumably more restrictive national community standard. *See* note 71 *supra*.

[75] *See* text accompanying notes 63 and 64 *supra*.

the former need not appeal to the prurient interest when children are in the audience.

The most narrow reading of *Pacifica*, therefore, is that the tests established in *Miller v. California*,[76] when applied to the broadcast media, are altered only to the extent that, when children are likely to be in the audience, there is no requirement that the broadcast materials appeal to the prurient interest in order to be banned as "indecent." The other *Miller* requirements—which provide procedural as well as substantive safeguards against suppression of constitutionally protected materials—remain intact and must be met before the FCC may censure a broadcaster for its presentation of morally objectionable material.

However, when analyzed in conjunction with the FCC's *Order* in the case and with the prior FCC indecency determinations discussed above, the *Pacifica* decision may be read more broadly to leave very little of *Miller* in the broadcast indecency context. Which of these readings is the correct one, however, is unclear, and as Justice Brennan notes in his dissent, "neither of the opinions comprising the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive."[77]

An examination of the obscenity standard in light of the indecency standards applied by the FCC in *Pacifica*, *Sonderling* and *WUHY*, will demonstrate its survival, modification, or elimination in the context of FCC decision-making.

1. The Objection to the Material Must be Based on the Work As a Whole

In *Pacifica*, the FCC censured station WBAI based on the Carlin recording alone—not the recording in its context of the whole program, which focused on societal attitudes toward language. The Sonderling Broadcast Company was censured for isolated instances of indecent and obscene language which were part of a five-hour program.[78] And in *WUHY* the Commission apparently listened to only selected excerpts of the recorded interview. Thus, the two-prong test formulated by the Commission in *WUHY* and applied in *Sonderling* effectively eliminated the requirement that the work be judged in its context. The Commission claimed by way of rationalization that radio programs are generally episodic in nature, and that it is therefore commonplace for the audience to listen only to "short snatches" of a broadcast. The Court of Appeals, in reviewing the Commission's *Sonderling* decision, approved this reasoning and, further, placed the burden on the licensee to present evidence as to why the "dirty" material must be judged in the context of the whole.[79]

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[76] 413 U.S. 15 (1973). *See* text following note 51 for a specific enumeration of the six elements of the *Miller* test.

[77] Pacifica-U.S., *supra* note 1, at 3051.

[78] The FCC staff had monitored and taped 61 hours of programming that fo-

Similarly, while the Supreme Court in *Pacifica* does not extend this segmented approach to allow FCC censure of "the isolated use of a potentially offensive word,"[80] neither does it require the Commission to judge instances of indecency in the context of the entire program. The Court suggests, however, that the content of the program will be somewhat determinative of the program's audience and thus will be useful in a consideration of whether certain material is "indecent" as to that audience.[81]

2. The Work Must be Judged by Community Standards

One of the more significant holdings of the *Miller* decision was that "community standards" were to be defined in state and local terms. In so holding, the Court rejected the imposition of a national standard previously employed in defining obscenity. Even though the Constitution covers one nation, it was said, determinations of a work's offensiveness are factual

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cused on sexual topics, the "dirtiest" 22 minutes of which were culled for presentation to the Commissioners. *See*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 400 (D.C. Cir. 1975).

[79] *Id.* at 406. As Judge Bazelon noted in dissent, under tests established by the Supreme Court, there is an affirmative duty on the censor to consider the material as whole. *Id.* at 418. The Court of Appeals, however, found there was no such duty.

[80] *See* Pacifica-U.S., *supra* note 1, at 3046 (Powell, J., concurring).

[81] The Court noted:

> Even a prime-time recitation of Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as, 'And prively he caughte hir by the queynte.' G. Chaucer, *The Miller's Tale* l.3276 (c. 1386).

Id. at 3041, n.29.

rather than legal and, as such, vary from community to community.[82] Although *Miller* addressed a question of state law, a companion case, *United States v. 12 200 Ft. Reels of Super 8mm Film*,[83] established that the local standard is also applicable to federal cases and federal legislation.[84]

Under the definition proposed in the *Pacifica Order*, the FCC sought to establish a new standard—the "contemporary community standard for the broadcast medium."[85] Three questions arise from the suggestion that there is a unique community standard of morality for the broadcast media. First, is it a national standard, or one to be applied variably at the local level? The FCC has stated its position[86] that, although the Supreme Court has declared that the relevant community exists at the state or local level, that decision may not be controlling in a broadcast context.[87] While the Commission may find a national standard to be more administratively manageable, overriding constitutional considerations recommend that state and local standards should be applied. In order to set a national standard, the Commission would in some way have to average the tolerance of communities nationwide for potentially objectionable material. Moreover, in setting this "average" standard, the Commission would deprive some more tolerant (perhaps more cosmopolitan communities) of material that would be permitted if local standards were applied, and would subject less tolerant communities to material that would be considered objectionable by local standards. No past decisions give guidance as to what is meant by "community standards" in the broadcast context; it is important that the meaning of this term be clarified so that broadcasters will know specifically the indecency standard to which they will be held.

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[82] 413 U.S. 15, 30 (1973).

[83] 413 U.S. 123, 130 (1973).

[84] *See also*, Hambling v. United States, 418 U.S. 87 (1974).

[85] Pacifica-FCC, *supra* note 6, at 98.

[86] *Explanation of Proposed Amendment to the Communications Act of 1934*, 122 Cong. Rec. S. 17101, 17110 n.122 (1976). (The FCC had proposed legislation in 1976 to clarify its authority to keep objectionable material off the airwaves. While the Commission is no longer pursuing enactment of the proposal, explanatory material forwarded to the Congress in support of the proposal is helpful to an understanding of the FCC's position concerning its authority to regulate such material) [hereinafter cited as Cong. Rec].

[87] The Commission noted that the decision which held that the community standard was to be defined in state and local terms dealt with a mail statute and did not address the electronic media. Because of the differences between these two media, the FCC contends that the decision may not be controlling. *Id.* at S.17110 n.122.

A second unanswered question is: how will the FCC determine the community standards once the community is defined? In a supplemental opinion in *Illinois Citizens*,[88] Judge Leventhal said the Commission must adopt, in its deliberations leading to substantive determinations of obscenity, approaches which provide "as nearly as possible the functional equivalent of a jury determination of a clear community consensus that the material is lewd and offensive."[89] The Commission believes that this requirement is met in forfeiture cases by the trial *de novo* procedure available under section 504.[90] In cases where *de novo* review is not available (i.e., license renewals) the Commission has suggested that it will conduct a proceeding which will ensure public participation.[91] One commentator has suggested that the need to ascertain community standards requires expert testimony unless the Commission introduces juries into its deliberations.[92] Each of these three methods—public participation, expert testimony, and jury-like deliberations—has aspects which recommend it as a suitable means to determine community standards. Each, however, has its short-comings. In order to provide the certainty required by the Constitution in a criminal context,[93] it would seem desirable for the FCC to determine which of these methods suits its administrative needs, and to seek public comment regarding its application.

A third question, and one which perhaps requires resolution by the Supreme Court since it was not squarely addressed in *Pacifica*, is: are community standards for radio and television more restrictive than for other media? The FCC maintains they are and has kept strict control over broadcasts of questionable material for years. Consequently, the community may now be more offended (or at least more shocked) by potentially obscene or indecent material heard over the broadcast media, if only because it has learned not to expect such material. However, this self-perpetuating argument may not be persuasive enough to override the constitutional considerations involved.

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[88] Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 406 (D.C. Cir. 1975).

[89] *Id.* at 407.

[90] Cong. Rec., *supra* note 86, at 17110 n.123. Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(a)(1970), gives a broadcast licensee a statutory right to refuse to pay an FCC-imposed forfeiture voluntarily and thus to require the Commission to seek to recover it in a trial *de novo* before a court.

[91] Cong. Rec., *supra* note 63, at S.17110 n.123. The Commission, however, does not suggest in these materials what procedures it would consider appropriate in gaining this public participation.

[92] Note, *Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579, 636 (1975).

[93] The use of criminal standards is appropriate since 18 U.S.C. § 1464 (1970) is a criminal statute. While criminal prosecution under this section is solely within the jurisdiction of the Department of Justice, Congress has also given the Commission certain enforcement obligations with respect to the section. *See* 47 U.S.C. §§ 503(b)(1)(E), 312(a)(6), 312(b)(2) (1970).

3. The Work Must be Patently Offensive

This requirement involves a factual determination, closely connected with the determination of the relevant community standards. Insofar as the patent offensiveness of the Carlin recording was conceded by WBAI, this question was not at issue in *Pacifica*. Additionally, both the definition proposed by the Commission in *Pacifica*, and the two-prong test established in *WUHY*, include the requirement of patent offensiveness. This element would therefore appear to survive as a condition precedent to a finding of "indecency."

However, the Commission's application of the requirement to specific factual situations is questionable. In *Sonderling*, the Commission labeled as "patently offensive" the most popular program in the Chicago area. The deficiency, though, may lie in the determination of the relevant community standard, and not in applying the "patently offensive" label to material analyzed in light of that standard. In *Sonderling*, as in *WUHY*, there was no discussion of what community was looked to, how its standards were determined, and thus no articulated judgment that the broadcast was patently offensive according to those standards.

4. The Conduct Proscribed Must be Specifically Defined by Statute or Later Interpretation

The *Miller* decision required specificity in state statutes prohibiting obscene expression,[94] and suggested examples of acceptably precise formulations."[95] This ruling regarding state obscenity laws was extended to apply to federal statutes a year later in *Hambling*.[96] The Court in *Pacifica*, however, did not address the question of statutory specificity. Instead it rested its decision on a quasi-nuisance concept of indecency.

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[94] "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed." Miller v. Cal., 413 U.S. 15, 24 (1973).

The definition proposed by the FCC in its original *Order* in the case attempted to provide a gloss of interpretive specificity to section 1464 as it applied to indecency,[97] but that definition was declared invalid by the Court of Appeals on the grounds of overbreadth and vagueness. That court held that the definition was unsatisfactory in that it failed to define children, and because every use of the seven words could not be deemed offensive even as to minors.[98] In 1976, the FCC had proposed to the Congress legislation to amend the Communications Act of 1934 with respect to the dissemination of obscene or indecent material.[99] One section of the proposal would have precisely defined "indecency,"[100] and would have eliminated any vagueness objection. However, the Commission has not pursued enactment of that legislation and has requested no clarification of its authority to regulate or define indecent or obscene material in connection with the current effort in the House of Representatives to re-write the Communication Act.[101] Further, the Commission staff has indicated that the Commission will probably not seek to clarify the obscenity standards or their application through the rulemaking process.[102]

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[95] "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

[96] Hamling v. United States, 418 U.S. 87 (1974).

[97] Pacifica-FCC, *supra* note 6, at 98.

[98] Pacifica-Appeals, *supra* note 19, at 17.

[99] CONG. REC., *supra* note 86, at S. 17101.

[100] "The term 'indecent material' means a representation or verbal description of a human sexual or excretory organ or function, which under contemporary community standards for radio communication or cable television is patently offensive." *Id.*, at S. 17101.

[101] Telephone conversation with Harry M. "Chip" Shooshan III, Chief Counsel, Telecommunications Subcommittee, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C., Aug. 29, 1978.

[102] Telephone conversation with Frank Washington, legal assistant to FCC Chairman Ferris, Dec. 5, 1978. Washington emphasized that an actual decision not to issue regulations had not been made by the 5-member commission, but con-

Thus, the *Miller* requirement of statutory specificity has not been applied by the Court in the area of broadcast indecency. Nor does the FCC appear inclined to provide specific statuatory language in the absence of a judicial mandate to do so.

5. The Material as a Whole Must Lack Literary, Artistic, Political or Scientific Value

In its *WBAI* order, the FCC announced that when children are likely to be in the audience, a broadcaster's claim that material has redeeming social value will not be considered. During the hours when children are absent from the audience, redeeming value will be considered only if a substantial effort was made to warn unconsenting adults of the possibly objectionable nature of the broadcast.[103] This policy is a departure from the standard announced in *WUHY* and applied in *Sonderling*, where the Commission, guided by the then-prevailing obscenity standard, said that to be judged indecent, the broadcast material must be "utterly without redeeming social value."[104]

In practice, therefore, it can be assumed that *Miller's* requirement that the material lack "serious literary, artistic, political or scientific value" will no longer be applied during the hours when children are presumed to be in the audience, and will be applied in only a limited manner at other times.

6. Summary

The FCC has defined "indecency" with reference to

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ceeded that such a decision was implicit in the tone of Chairman Ferris' July 21 speech to the New England broadcasters and FCC decisions following *Pacifica*. See text accompanying notes 105-22 *infra*.

[103] Although this Order was overturned by the Court of Appeals and not revived by the Supreme Court in its review, the FCC has recanted the definition, and thus perhaps indicated its intention to pursue it. WGBH Educational Foundation, 43 R.R.2d 1436 (1978).

[104] WUHY-FM, 24 F.C.C.2d 408, 412, 18 R.R.2d 860 (1970). Both *WUHY* and *Sonderling* were considered by the Commission before *Miller* was decided by the Supreme Court. *Miller* rejected the previously applied rule that material was censurable only if "utterly without redeeming social value" and substituted a less restrictive rule that permits prohibition if the material lacks "serious literary, artistic, political or scientific value." 413 U.S. 15, 24-25 (1973). Neither of these standards are applied by the FCC, however, in judging morally objectionable materials if children are in the audience.

Supreme Court obscenity standards. However, of the six requisite elements of obscenity established by the Court in *Roth* and *Memoirs* and refined in *Miller*, only the requirement that a work be patently offensive appears to have survived *Pacifica* intact.

While it remains necessary that a work be judged by community standards in order to be banned as "indecent," the ascertainment and application of these standards are surrounded by important questions, the resolution of which may decide the ultimate vitality of the requirement. Additionally, the required element that a work must lack serious literary, artistic, political or scientific value in order to be banned will only be applied during whatever few hours children are deemed not to be a part of the audience.

The other tests established in *Miller*—that the work appeal to the prurient interest, that it be judged as a whole, and that it portray or describe conduct specifically proscribed by law—would now appear to be inapplicable in judging broadcast indecency.

III. APPLICATION OF *PACIFICA*

A. *"The FCC Is Not Going To Become a Censor"*[105]

In a speech to New England broadcasters two weeks after the *Pacifica* decision was announced, FCC Chairman Ferris told his audience: "I do not want that case to lead to timidity in your coverage of controversial subjects."[106] In an effort to defuse critics of the opinion, Ferris noted that the circumstances of WBAI's broadcast are "about as likely to occur again as Haley's Comet."[107] He then pointed to the Commission's July 20, 1978, decision in Boston Station WGBH-TV's license renewal proceeding[108] as a demonstration of the restraint the FCC intends to exercise in responding to future indecency complaints. In that proceeding, Morality in Media in Massachusetts had filed a petition with the FCC to deny license renewal for noncommercial station WGBH on the basis that the station was "consistently broadcasting offensive, vulgar and otherwise harmful material to children without adequate supervision or parental warnings."[109] The petitioner identified four specific programs which either expressed philosophies not deemed fit for youth, or which contained isolated usage of "vulgar" words.[110] In denying the petition, the Commission stated,

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[105] Speech by FCC Chairman Charles D. Ferris to New England Broadcasters Assoc., Boston, Mass., July 21, 1978 [hereinafter cited as Ferris Speech].

[106] *Id.*

[107] *Id.*

[108] 43 R.R.2d 1436 (1978).

> we cannot base the denial of a license renewal application upon the 'subjective determination' of a viewer, or a group of viewers, as to what is or is not 'good' programming . . . . [A] petition to deny must contain 'specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience or necessity.[111]

The Commission continued:

> With regard to "indecent" or "profane" utterances, the First Amendment and the "no censorship" provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court's decision in [*Pacifica*] affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding.[112]

In announcing the decision, the Commission said its consideration was limited to a review of whether a licensee's overall programming had served its area and not whether any particular program was appropriate for broadcast. It is the licensee's responsibility, the opinion asserted, to determine what programming is appropriate or suitable for airing.

B. *The Need To Establish Standards*

The WGBH opinion and Chairman Ferris' speech clearly demonstrate the FCC's present intention to stay well within the most narrow reading of the *Pacifica* decision, acting only to censure the most blatant broadcast "verbal shock treatments,"[113] such as that delivered by WBAI in its airing of the Carlin recording.[114] However, this Commission's approach to the problem of morally offensive programs has not been shared by past Commission majorities,[115] and there is not assurance that it will continue to be the majority attitude. An administrative agency—even an independent agency such as the FCC—in which decisions are made by political appointees with terms of limited duration, is likely to be subject to pressures from the executive branch and from Congress. This, obviously, is not the ideal forum for a determination of constitutional rights. It is even less so when the decisions are made on an *ad hoc*, case-by-case basis.

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[109] *Id.*, at 1436.

[110] The programs complained of by the petitioner were: *Masterpiece Theater*, *The Thin Edge*, *Monty Python's Flying Circus*, and *Rock Follies*. *Id.*

[111] *Id.* at 1439.

[112] *Id.* at 1441.

[113] Pacifica-U.S., *supra* note 1, at 3044 (Powell, J., concurring).

[114] It should be pointed out, however, that *Pacifica* and the *WGBH* opinion are

Justice Powell, concurring in the Court's *Pacifica* decision, expressed confidence in the FCC's ability to make the "sensitive judgments required"[116] in balancing free speech rights with the rights of unwilling adults to be free from exposure to objectionable material. Justice Brennan, on the other hand, was "less certain. . .that such faith in the Commission is warranted" in light of past FCC indecency determinations.[117] The larger question, though, would seem to be whether the Supreme Court should have left to agency determination important questions regarding first amendment freedoms without some indication of procedural safeguards to assure that protected speech is not unconstitutionally abridged.

The danger inherent in the decision is that, in the absence of precisely defined indecency standards, the Commission will be forced into the decisional quagmire which the Supreme Court itself faced until it established the constitutional tests for obscenity articulated in *Miller*. The frustration of the standardless adjudication which the Court confronted prior to *Miller* was expressed by Justice Stewart in *Jacobellis v.*

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distinguishable to the extent that the latter involved license renewal. As such, the consequences of the Commission's findings of indecency on the part of WGBH would be much more severe than in the *WBAI* case.

[115] For purposes of comparison, it is instructive to contrast the tone of Chairman Ferris' speech, *supra* note 105, with that of a speech delivered by Chairman Richard E. Wiley in 1974 warning licensees that "he saw 'dark clouds' on the TV horizon and that broadcasters had better show 'taste, discretion and decency' in their programming." *Washington* Post, Nov. 3, 1974, at K-1, col. 4.

[116] Pacifica-U.S., *supra* note 1, at 3046.

[117] *Id.* at 3051 (dissent). Justice Brennan refers to Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 418-21 (D.C. Cir. 1975) (statement of Bazelon, C.J., as to why he voted to grant rehearing en banc) to support his lack of faith in FCC obscenity/indecency determination.

Ohio:[118]

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. *But, I know it when I see it* . . . .[119]

A precisely defined test against which to judge questionable material diminishes the danger of infringement of constitutional rights. However, the FCC has indicated that it will not seek to assure broadcaster certainty through its rulemaking process.[120] In the absence of court-established tests or FCC regulations, licensees seeking guidance can only look to the broad conclusory statement contained in Chairman Ferris' July 21 speech: "The Commission's highest priority continues to be to *encourage* bold, innovative and controversial programming—not to discourage it."[121]

The establishment of precise standards through rulemaking procedures would not only provide more certainty for broadcasters who must make daily programming decisions, but would also lead to the development of more consistent, rational and socially beneficial criteria than would be possible through case-by-case adjudication. The Commission would be in a position to solicit the views of the industry, constitutional and sociological scholars, community groups and others who would be unable to participate in individual decisions. Additionally, relatively straight-forward technical factors--such as determining the hours when children are sufficiently absent from the audience to permit presentation of "adult" material, at what age should children be protected, what community is to be looked to in establishing community standards, and how those standards are to be ascertained—can be more efficiently determined in a rulemaking rather than an adjudicatory setting.

A serious danger inherent in the continued absence of specific standards is the chilling effect the decision is likely to have on licensees. Despite Chairman Ferris' admonition that broadcasters must not let *Pacifica* "lead to timidity in . . . coverage of controversial subjects,"[122] the broad discretion apparently granted to the Commission by the Supreme Court in *Pacifica* will undoubtedly inhibit much speech as broadcasters react to protect their commercially valuable licenses.

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[118] 378 U.S. 184 (1964) (Stewart, J., *concurring*).

[119] *Id.* at 197 (emphasis added).

[120] *See* note 102 *supra*.

[121] Ferris speech, *supra* note 105, at 6.

[122] *Id.* at 2.

CONCLUSION

The controversy between the FCC and WBAI in *Pacifica* allowed the Supreme Court an opportunity to indicate where the balance was to be struck between a broadcaster's freedom of speech in presenting non-obscene but objectionable material and an individual's right to be free from such material received through the broadcast media in the privacy of the home. In determining that the privacy interest was the greater of the two freedoms, however, the Court failed to articulate standards for future review of objectionable broadcasts, and apparently weakened the *Miller* test as applied to the broadcast media.

It is now the FCC's task to flesh out the contours of the *Pacifica* opinion in order to provide broadcast licensees with the operational guidelines which the Court's opinion lacked. While it is the Commission's present intention to proceed on a case-by-case basis, this Comment has proposed that a formal rulemaking would be the preferred course of action. Technical questions could be resolved in a more efficient and less costly fashion; the Commission would have the benefit from a complete and rationally developed standard of what objectionable material is proscribed. Without such standards to define where the line between acceptable and unacceptable material will be drawn—or at least a determination of what criteria will be considered in deciding on which side of the line questionable material will fall—broadcasters may be reluctant to air bold, diverse or unpopular views lest they jeopardize renewal of their licenses. It is only through the establishment of comprehensive standards that the FCC will assure that the airwaves will remain open to the full range of protected speech.

Susan Wing*

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Regulation of Television Broadcasting

How Costly Is the "Public Interest"?*

Robert W. Crandall

As viewers of American television flip across their dials in search of something they would like to see, they are silently mocked by seventy-five or more channel demarcations where their sets do not respond. Instead of many choices of program, they must reconcile themselves to three, four, or perhaps five.

Sometimes they must wonder why. If asked, they are likely to blame the limitation on technical problems: there are not enough channels available, so the government has to allocate a minimum number to each community. The explanation sounds reasonable, and it is the one that has been encouraged—or at least not discouraged—by the Federal Communications Commission (FCC).

The real reason has little if anything to do with electronic phenomena—with either a shortage of channels or, as some would have it, the inherent inferiority of UHF. Rather, the limitation exists because of the FCC's desire to make sure that viewers are offered a big dollop of edification with each swallow of entertainment no matter how edifying the edification or how entertaining the entertainment.

I do not intend to discuss program quality or whether federal regulation of the television industry is necessary or desirable. My objectives are far more limited. They are (1) to explore the rationale underlying the FCC's policy for regulating commercial television broadcasting and (2) to examine whether that policy has been effective, regardless of the merits of those objectives.

Robert W. Crandall, deputy director of the Council on Wage and Price Stability, formerly served as professor of economics at the Massachusetts Institute of Technology and as advisor to a member of the Federal Communications Commission.

I address the first point by showing how the FCC's policy for allocating channels has restrained competition, fostered monopoly profits in broadcasting, and provided the means for subsidizing "merit" programming—programming that is regarded as worthwhile by the FCC but that would not be provided by the station on the basis of its audience appeal. This merit programming consists of local and national news and public affairs, along with almost anything else (in addition to news) that is locally produced.

I address the second point by assessing the extent to which the FCC's merit programming policies yield nonentertainment programming costs roughly corresponding to the monopoly profits brought about by the limitation on the number of stations. To do this I will analyze the costs of different kinds of programming. Essentially my analysis represents the first attempt to measure the degree to which the FCC extracts a quid pro quo—costs incurred by broadcasters for merit programs in return for benefits that go along with restricting the number of stations and providing a more limited choice of programs.

Interpreting the "Public Interest"

Were profit maximization sufficient to ensure that stations served the "public interest," the commission's only role would be to enforce spectrum property rights. Once such rights were defined, broadcasters could bid for them and offer any programming that they believed to be profit-maximizing. Clearly, the FCC has not interpreted the 1934 Communications Act in the limited way this would suggest. Television station licensees are evaluated on the basis of their record in serving a wide range of individual interests, in reporting local, national and world events, and in examining the many issues facing (or presumably facing) their viewers. In other words, a station's performance is assessed by the FCC according to measures of the quantity and quality of its nonentertainment programming in general and local programming in particular.

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Not surprisingly, the commission has begun to require that stations tabulate the amount of merit programming of all types that is offered during an annual sample of seven days chosen at random. It has also begun to collect and publish these tabulations for all stations, with this information becoming part of the license renewal process every three years. In addition, each station must somehow ascertain its community's programming needs and design its offerings of local news and public affairs to meet them. This process is supposed to make local station managers more responsive to the concerns of their communities.

It is important to emphasize that FCC regulation of television broadcasting is aimed primarily at the *station* licensee. Each network owns five stations, all VHF[1] and all in major markets. Each of these stations and the network as licensee (but not as a network per se) are subject to the same regulation and license renewal procedure as any of the network's 200 or more other affiliates. Though networks are not subject to licensing proceedings except as station owners, the FCC does have an effect on the quantity and quality of network programming. For instance, a 1970 decision to restrict the amount of entertainment programs that may be offered during prime viewing hours was based on the commission's view that stations should be encouraged to select programs from a wide universe of program suppliers. The result of this rule has been to substitute game shows (which are relatively cheap) for more expensive programs offered by the networks. One may note also the recent informal and apparently illegal "family hour" limitation of sex and violence during evening hours negotiated with the networks but formally directed at the *stations'* programming activities. To the extent that a station's programming decision is simply to connect or not connect to a network feed from New York, the policies aimed at affecting station program quality or quantity are also, in fact, aimed at the network.

Monopoly, Cross Subsidy, and FCC Leverage

In 1952, when the FCC announced its final VHF-UHF television plan, it reaffirmed ("grandfathered") the existing VHF allocations, mostly to avoid confronting the owners with a loss of franchise value. Because of this decision and also because of a generally "populist" philosophy, the commission dispersed VHF channels across the country in such a manner that only 30 percent of all television homes can receive four or more commercial VHF stations "off the air" (meaning without some inter-

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[1] VHF (very high-frequency transmission) accounts for twelve of the eighty-two channel numbers appearing on the TV dials. UHF (ultra high-frequency transmission) accounts for the other seventy.

mediary such as cable), and less than 15 percent can receive five or more. Markets like Boston, Cleveland, Cincinnati, Baltimore, Philadelphia, and Atlanta were given only three commercial VHF stations so that Hartford, Toledo, Columbus (Ohio), Lancaster (Pennsylvania), Chattanooga, and Macon (Georgia) could have one or more.

While another 30 percent of television homes can receive a fourth commercial television service—through the UHF band—and many other markets have unused UHF allocations, the inferiority of UHF stations when competing with VHF stations in the same market limits such actual or potential competition. UHF signals are not as easily received and are much more difficult to tune in on the average household set. Thus, the commission has, through its allocations plan, created substantial monopoly power in television broadcasting—monopoly power which is by no means inevitable, given the available spectrum and the technology that can be applied to use it. Far more competition would have been technically feasible and still would be.

One way to permit the growth of competition would be to permit television signals to be broadcast over a much wider spectrum than the FCC allows. Another would be to reallocate the eighty-two channels now designated for television so as to give each major market perhaps as many as ten or twelve equivalent, competing stations. Smaller markets could then be accommodated with cable television or translators.

All proposals to increase competition, however, have been rejected outright or simply not acted upon. One of these, made by the Dumont network in 1948, was to centralize VHF allocations in the larger cities, giving five or more channels to each, and to use UHF to serve the smaller outlying markets. Another recent proposal would have increased the number of VHF outlets by reducing the geographical distance between selected stations. A third would have reduced the "intermixture" of VHF and UHF channels so as to increase the number of effectively competing commercial stations in each market. This could be done by giving VHF to some cities and UHF to others nearby. The effective use of UHF would of course greatly increase the number of stations that each market could have. (The twelve channels in the present VHF band support over 500 commercial stations, while seventy channels in the UHF band support fewer than 200 commercial stations.) In any case, the practical effect of the allocations plan has been to provide the FCC with considerable leverage for requiring licensees to cross-subsidize programs that the commissioners believe reflect the "public interest."

Thus, the commission has, through its allocations plan, created substantial monopoly power in television broadcasting. . . .

[And] whenever a change . . . is suggested . . . the commission accedes to arguments that greater competition would be contrary to the public interest because it would reduce discretionary revenues used to subsidize merit programming.

The commission does not assert that it has deliberately contrived a channel scarcity in most markets, nor does it admit that it has deliberately created monopoly profits for some commercial programs. Nevertheless, whenever a change in the system is suggested—whether by means of spectrum reallocation or greater latitude for cable television service—the commission accedes to arguments that greater competition would be contrary to the public interest because it would reduce discretionary revenues used to subsidize merit programming. Thus in fact the policy is one of offering the quid pro quo: a limit to competition among broadcasters offering entertainment in return for a commitment to offer presumably unprofitable programs that are deemed to be of greater social value.

This policy of cross-subsidization is familiar to students of public regulation. It has often been employed in the fields of transportation and telephone communications, with dubious results. Rarely does a regulatory commission have evidence that the policy actually works. But since it does not have contrary evidence either (or chooses to disbelieve any that it has), it listens sympathetically to existing franchise holders who argue that admitting new entrants would destroy the cross-subsidization cherished by the regulators. However the FCC has not even sought evidence to support its view, or even the data from which evidence could be assembled.

The Cost of Merit Programming: Theory

It is not immediately obvious that, other things being equal, a broadcaster's profits should vary inversely with the amount of news and public affairs programs offered. Merit programs may cost no more to produce than other programs. If scheduling a substantial number of these programs makes license renewal easier, the station may well be pleased to do it.

On the other hand, offering more merit programming could reduce profits—either from decreases in revenues or from increases in programming costs. If news and public affairs are less popular with viewers than entertainment programs but require outlays as great or nearly as great, they will produce, at their broadcasting hour, a revenue loss to the station. However, since the size of the *total* viewing audience in a market at any hour is virtually fixed, one station's sacrifice is another's gain. Thus, if all stations in a market should offer the same mix of news and public affairs and popular entertainment, the total audience for each station should be unaffected over time, even if news and public affairs suffer greatly in competition with other programs.

Analyzing the precise effects of the requirement for lower-audience merit programming is even more difficult than this reasoning suggests. During some periods, such as early or late evening, all stations may be offering news programs in some markets, and in these cases the evidence suggests that few, if any, viewers are lost. During other periods, two or three stations may be offering network or local news while an "independent" (non-network affiliate) station shows an old motion picture or network rerun. In this case, there is a distinct tendency for the stations offering news to lose viewers to the independent. Since public affairs programs and certain local programming will usually be run opposite at least one entertainment program on a rival channel, these programs will usually drive viewers away, leaving the broadcaster with a smaller audience for the merit program—and perhaps, because of viewer inertia, even during succeeding hours. But, as we noted, if all stations offer the same proportion of merit programs, each will experience its share of temporary viewer loss, and the relative position of the stations will be unaffected.

Given that viewers tend to switch channels rather than turning their sets off, it follows that the FCC's policy of requiring programming in the "public interest" could affect total broadcaster profits only if it affected the cost per viewer hour delivered to advertisers. This might occur if news and public affairs programs were more expensive to produce *per viewer attracted to them* than the entertainment programs they displace. But even if they were, total program costs per viewer for all broadcasters might not be raised because of the effect of merit programming upon the audience for competing programs at the same hour. A simple example will illustrate this effect.

What a network will pay for a program will depend on what it expects to be able to charge for commercial time. Suppose that a network paid $2 million for the rights to exhibit *Jaws* during prime time. It might have calculated that it could sell twenty minutes of commercial time during the exhibition of this film at, say, $150,000 per minute, assuming average competition from the other networks' programs during the time the film is shown. Faced with this awesome competition, a rival network might choose to offer a public affairs program that provides, say, a detailed look at air bags for automobiles. Once this sacrifice is announced, the network offering *Jaws* will raise its asking price of commercial minutes in the film to perhaps $175,000 per minute (if it has not yet sold all of the time). Can the film company that sold the rights to *Jaws* now raise its price? The answer is "no" because program contracts are signed considerably in advance of exhibition—often as much as two or three years—without any provision for escalation if the audience is larger than anticipated.

In this hypothetical case, even if the air bags documentary were more expensive than *Jaws* per viewer delivered, the total cost per viewer of all network programs during relevant hours might be no higher than if all three networks offered standard entertainment fare. Hence, while a higher cost per viewer for news and public affairs is a necessary condition for the existence of cross-subsidy, it is not a sufficient condition. There may in fact be corresponding reduced costs per viewer for the programs the viewers choose to watch instead of the merit programs. Only if all news and public affairs were offered at times when other types of programs were unavailable could one assert that the higher cost per viewer for such programs would prove cross-subsidization.

The Cost of Merit Programming: Network Data

In this section, I attempt to determine the network cost per viewer per hour for prime-time entertainment series and for network news and public affairs programming. If there is a substantial added cost to merit programming, there may be a cross-subsidy and we may be able to measure it. If there is little or no added cost, there can be no cross-subsidy.

Unfortunately annual tabulations of network news and public affairs programming are not now published, but each network supplied the author with a complete listing of its 1973 programs, as well as average audience ratings if they were available.[8] Many special (one time only) public affairs programs were not rated by the commercial audience surveys, so ratings were assumed for these programs equal to the average of those special programs that were rated. The results for each network are presented in Table 1, which shows the number of hours of news and public affairs on each network and its average Nielsen rating (the proportion of the nation's television homes viewing the regular and "special" programs, according to sample surveys).

Obviously, some way of distinguishing among programs must be found. For present purposes, the distinctions are dictated by the availability of cost data. Each network submits its estimate of the costs of "news and public affairs" programming annually to the FCC, which publishes an aggregation of these estimates. This aggregate cost estimate is used in my analysis, so that I include as "news and public affairs" all the programs so classified by the networks themselves.

The variance in the number of merit programming hours offered by the networks is striking. ABC lagged behind the other two by a wide margin, though it led in average audience yield. Its slightly better audience performance derived from the fact that it offered fewer programs during marginal time periods, rather than reflecting the performance of ABC's nightly news programs or of its regular public affairs offerings. NBC scheduled the largest number of news and public affairs hours because the *Today* show was classified as being entirely in this category. ABC had not yet begun competing with *Today*.

Since prime-time entertainment series attracted on average 18 percent of the nation's television homes, Table 1 suggests that, on average, network news and public affairs attracted between 40 percent and 50 percent of the audience for prime-time entertainment series in 1973. But how much did these programs cost—both absolutely and in relation to the more popular entertainment series? The individual network data are not available for public disclosure, but reports to the FCC can be used to obtain at least a rough estimate. In 1973, the three networks combined reported that they spent $139,836,000 for the programs included in Table 1, $9,485 per rating point per hour. If prime-time (evening) entertainment programs cost the same per rating point per hour, attracting 18 percent of television households, average costs would come to $170,750 per hour. In 1973, the networks incurred costs of approximately $550,000,000 for prime-time entertainment programs, or slightly more than $180,000 per hour.[9]

Table 1

NEWS AND PUBLIC AFFAIRS PROGRAMMING OF THE THREE NATIONAL TELEVISION NETWORKS, 1973

Network	**Total Hours of News and Public Affairs**	**Average Audience** (percent of national television homes)
Regularly scheduled programs		
ABC	234	7.7
CBS	619	6.2
NBC	746	7.2
Specials		
ABC	21	8.7
CBS	210	8.2
NBC	218	8.4

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[8] These tabulations and the local-station program logs, described below, were submitted to the author while he was an adviser to Commissioner Glen O. Robinson in 1974-75.

[9] This is an estimate based upon reported total programming costs, data on the cost of new and continuing programs, and conversations with network executives.

On this basis it appears that the networks may actually spend less per viewer for news and public affairs than for entertainment series exhibited during prime time. The comparison is only approximate, however, and should be qualified for two important reasons.

> **. . . it appears that the networks may actually spend less per viewer for news and public affairs than for entertainment series exhibited during prime time.**

First and most important, in 1973 an unusually large number of public affairs programs were unsponsored special events, many of them dealing with the Watergate affair. An inspection of the actual programs indicates that approximately 12.5 percent of the total viewer hours may have been unsponsored or relatively free from commercials. On the other hand, most network news and public affairs programs are broadcast at non-prime hours, during which the networks and local stations insert more commercial minutes of advertising than they do in prime hours. These two factors may cancel one another—that is, the absence of advertising in some may be offset by the greater-than-average amount of advertising in others. Even if they do not cancel out, however, the average cost per viewer of sponsored news and public affairs programs would not rise materially above the $180,000 for entertainment programs. The networks almost certainly do not lose money on entertainment. Therefore, it seems unlikely that news and public affairs are a source of economic losses—so long as advertisers using them pay no less per viewer than they do for entertainment programs.

That the networks do not lose money on news and public affairs might appear surprising, but a reading of recent network activities suggests that network news is indeed profitable, at least at the margin. Each network has been studying the possibility of extending its nightly half hour of news to a full hour, but affiliates' objections have apparently blocked the move. Moreover, the competition at 7:00 A.M., based largely on news and information programming, suggests that the networks believe this programming can be remunerative. Doubtless, some of the public affairs programs in prime-time sacrifice audience, but the numbers would indicate that the overall cost per viewer of public affairs and news is no higher than the cost of prime-time entertainment. Thus, as long as the *total* audience of the three networks at each time period is unaffected by the insertion of news or public affairs programs, their combined profits are unaffected by satisfying the FCC's appetite for merit programming.

The Cost of Merit Programming: Local Station Data

In this section, I offer a fairly strong test of the degree of cross-subsidy at the local station level by comparing the cost per viewer of news, public affairs, and local programs with the same measure for entertainment programs. If the total television audience is unaffected by the extent of merit programming, such a test provides a maximum measure of the degree of cross-subsidy. If one station's sacrifice of news and public affairs programs enhances the audience for rival stations, this net gain should be deducted from the cost of the merit program in establishing the net cost to all broadcasters. On the other hand, if viewers simply turn off their sets in response to the merit program, it is unclear whether total broadcaster profits are raised or lowered, since one cannot know whether a decrease in audience raises the price paid by advertisers per viewer more than it decreases the number of viewers. The commission's policy might reduce total audience—and therefore advertising output—to a level closer to monopoly equilibrium, which would mean that the "cost" to broadcasters (as a group) of the policy of requiring unpopular programming might actually be negative.

Surprisingly, the FCC does not have much in the way of usable data on the extent of local station programming, its audience appeal, or its cost. In order to analyze the economics of local programming, I asked fifty stations, randomly selected from a list of all licensees, to submit their daily program logs for a "sample week" of seven randomly chosen days in 1972–73. Of these fifty stations, thirty-five provided sufficient information to permit identification of local programs from these logs. Audience figures were obtained from a national market research survey of programming in the respective local markets. Wherever audience information was missing, it was estimated on the basis of data for similar programming in the same market at similar times. The same was done for all filmed and taped programming (most of which consisted of reruns of old network series). Since it may be assumed that profit-maximizing decisions generate the prices for the fixed stock of these film-tape programs, they serve as a control group for analyzing the economics of local programming.

For local station programming costs, I followed the FCC practice of assuming that all reported program expenses other than film and tape rentals are assignable to "local" programming. Considering the FCC's stress upon local programming in the license renewal process, it is reasonable to presume that any bias in station reports will be towards allocating the general expenses of station operations to "programming" (which here means local programming). Therefore, conclusions on the cost of local programming are likely to be biased upwards by an unknown amount.

Table 2 provides the summary data for film-tape and other (local) programs by average station outlays per week, total viewing households during the program week, and the average cost per household. Since the "sample week" spanned 1972-73, the cost data were averaged for the 1972 and 1973 calendar years. The audience data were drawn from two sample periods—one in 1972, the other in 1973.

For these stations, local programming appears to be much more expensive per viewer generated than film-tape programs. Obviously, therefore, the stations were not acting as profit maximizers. If they had been, they would either have substituted film-tape for local programming until the incremental costs per viewer were equalized, or they would have reduced total program hours by reducing local offerings. The observed patterns cannot be consistent with profit-maximizing behavior in view of the smaller audiences realized per hour of local programming.

In their reports to the FCC, the thirty-five stations in the sample described above showed an average of 14.3 hours of local programs per week. My review of the program logs produced a slightly lower estimate—13.1 hours. In part, this difference may have resulted from the fact that I did not count very short local announcements and other minor interruptions which a station might call local programming. On the other hand, I assigned an entire hour to local programming if the show was scheduled for an hour, whereas the reports to the FCC are supposed to omit commercial interruptions in calculating local program minutes. Certainly the fact that my estimate of local program hours is not highly correlated with the official tabulations provided by the stations—indeed the correlation is only 49 percent—suggests considerable variance in the definition of local programming.

The difference in the estimates of local programming is not trivial. In order to analyze the effect of competition, station size, and certain other factors on local program effort, I attempted to carry out regression analysis both on my sample of 35 stations and on a much larger sample of 465 stations. (The latter sample includes only network affiliates and utilizes the official FCC compilations of program hours.) In the larger sample, station revenues appeared to contribute most to explaining the variance in local programming effort, followed by newspaper ownership of the station and the size of the market.

When my estimate of local program hours was used for the sample of thirty-five stations, it turned out that the number of stations in the market was the only characteristic highly correlated with the total number of hours. Moreover, for these thirty-five stations, local programming hours were more highly correlated

Table 2

STATION PROGRAMMING COSTS
PER VIEWER, 1972–73
(35-station sample)

	Types of Programs	
	Film-tape (non-local)	Other (local)
Average station outlays per week in 1972–73 (thousands of dollars)	5,860	14,430
Average audiences during sample week (thousands of households × hours)	1,241	560
Average cost per 1,000 households per hour (dollars)	4.72	25.77

Source: FCC Forms 324 and American Research Bureau Market Reports.

with market size than with station revenues. This suggests that competition induces more local program effort, while additional station revenues (for a given market size and degree of competition) have no perceptible effect.

> **These results cast doubt on the notion that the FCC can stimulate local programming effort by restricting the number of stations in a given market and thereby raising station revenues.**

These results cast doubt on the notion that the FCC can stimulate local programming effort by restricting the number of stations in a given market and thereby raising station revenues. Even accepting the results of the regression analysis based upon the larger sample—and making use of the stations' own reports to the FCC—one must conclude that the total amount of local programming is not increased by restricting the number of stations. Other things being equal, a reduction in station revenues generates a reduction in local programming hours which is equal to one-third of the percentage reduction in revenues.[4] Thus, a doubling of stations, which should approximately decrease revenues by one-half, should reduce local programming on each station by one-sixth. But if the number of stations is doubled and local programming effort is five-sixths of its original level per station, total local programming in the market is actually increased. The average outlay per program would fall, but one cannot assert that the fall would necessarily affect program quality. Weather forecasters' salaries might fall, but the accuracy (or the attractiveness) of the meteorological forecast probably would not change—if one assumes that the same (or equivalent) weather forecasters would continue working for lower salaries.

The Quid Pro Quo

It appears that *network* public affairs and news programs are not more costly per viewer than entertainment programs, but that local public affairs and news programs are considerably more expensive than their alternatives (filmed and taped motion pictures and network reruns). One might conclude, therefore, that FCC regulation may succeed in forcing cross-subsidy of merit programming of a local nature from the profits yielded by entertainment programs, but that it has little effect upon the amount of network news and public affairs. Yet, how precise is the FCC quid pro quo for the local stations? Is it necessary to restrict the number of stations to its current level in order to provide each with the revenues to support local programming, or could similar results be obtained from a less restrictive policy?

The estimates in Table 2 suggest that as much as 82 percent of all nonfilm program outlays reported by stations may be sacrifices to the FCC's appetite for local programming effort. Given 1973 total broadcast revenues for licensed stations of $2.06 billion and 1973 nonfilm program expenses of $0.46 billion, the diversion (cross-subsidy) is *at most* 18.3 percent of total broadcast revenues. In other words, if a station could substitute film-tape entertainment programming at the current average cost per viewer for local fare and not lose revenues, income before taxes could rise by 18.3 percent of revenues. Since stations averaged a return (income plus interest) on sales of 24.6 percent before taxes, we might conclude that the FCC's allocations plan would have allowed stations to earn nearly 43 percent on sales before taxes in 1973 if cross-subsidy had not been practiced.

To translate this arithmetic into a return on capital requires only a measure of the total capital employed by television stations in 1973. The FCC reports that net *tangible* capital employed by television stations in 1973 amounted to $749 million. Since television stations are not investors in grand entertainment projects such as those developed by the networks, only about one-fifth of their capital is intangible.[5] Before taxes, 1973 profits of these stations were $468 million and interest payments were $38 million. Therefore, their before-tax return on all capital employed was 54.1 percent.

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[4] This is the result predicted by the regression equation based on the larger sample.

[5] This estimate is based on my review of balance sheets for new television station licensees. A review of public balance-sheet data for five multiple station owners for 1975-76 generally supports this estimate. These five companies had current assets (including film rights) in excess of current liabilities equal to 6 percent of their total assets less those assets covered by current liabilities. When one deducts "intangibles"—mostly capitalized monopoly franchise rents—from the denominator, the ratio rises to 25 percent. Hence, the estimate of 20 percent appears to be corroborated by historical cost data in licensees' public balance sheets.

. . . television broadcasting earned a healthy 29 percent return on capital above and beyond the cost of attracting it.

The industry's cost of capital, before income taxes, was about 25 percent in 1973.[9] Thus, television broadcasting earned a healthy 29 percent return on capital above and beyond the cost of attracting it. But without the merit programming requirement, stations might (by my estimate) have earned 95 percent on total investment before taxes, or a 70 percent return above and beyond the cost of attracting the capital. This 70 percent represents the quo—the monopoly profits provided by the lack of competition. The difference between 70 and 29 percent represents the cost of the merit programming—the quid.

This estimate of monopoly profits is at best a minimum one. In addition to the possibility that I have overestimated the cost of local programming, there is also a substantial probability that a large share of the monopoly revenues created by the commission accrue to performers as well as stations. Actors often earn $100,000 per hour of film in a continuing series and local newsmen may earn as much as $100,000 per year—prices greatly in excess of their earnings potentials elsewhere. These large salaries are greatly enhanced by the lack of channel choice in television. Were Johnny Carson or Carroll O'Connor competing with five or six other national programs at the same hour, advertising revenues from their programs would be 50 percent less than their existing levels. As a result, program production companies would bid less for these stars, directors, producers, writers, and other talent.

Should the FCC attempt to "tax" away the remaining excess profits of television broadcasters—profits its policies have created—by imposing more demanding merit programming requirements? Or should it perhaps entertain ideas of admitting greater entry into television broadcasting, increasing competition and channel choices available to most viewers? The latter course, whether pursued by liberalizing cable television rules, adding new assignments to the allocations table, encouraging satellite-to-home broadcasting, or shifting all television broadcasting to the UHF band, is generally opposed on the grounds that it would endanger the viability of some current or prospective television station somewhere. Roswell (New Mexico) and Hagerstown (Maryland) provide favorite examples. As long as the regulation of television broadcasting is based upon the belief that such very small stations must be nurtured by a uniform national policy, large monopoly profits will be earned by stations in New York, Chicago, and other large markets.

The price of the present regulatory strategy is not measured solely by the magnitude of the monopoly profits and the size of the merit programming cross-subsidy. By restricting competition, the FCC deprives viewers of a variety of alternative programs, which might have substantial value to them or to society. Is this restriction worthwhile? One would have to ask the viewers if they want more choices among mysteries, situation comedies, and movies at the expense of coverage of local politics, garden clubs, and bowling contests. Perhaps someone should. ■

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[9] This assumes a debt-to-equity ratio of 1:2, a stated cost of debt capital of 9 percent, and a before-tax cost of equity capital of 33 percent (or 17 percent after-tax). This cost of equity is the return demanded by current and prospective stockholders: it is what they expect to get in the way of dividends and growth. The estimate is based on a "riskiness" of the television industry derived from the capital-asset pricing model.

Selected References

Besen, S.M. et al. "Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation." In Paul W. MacAvoy, ed., *Deregulation of Cable Television*. Washington, D.C.: American Enterprise Institute, 1977.

Crandall, Robert W. "The Economic Case for a Fourth Commercial Network." *Public Policy*, Fall 1974.

Noll, Roger; Peck, M.J.; and McGowan, John J. *Economic Aspects of Television Regulation*. Washington, D.C.: The Brookings Institution, 1974.

Shooshan, Harry M., III. "Broadcasting." In *Options Papers*, Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 1977.

Northwestern University LAW REVIEW

FCC REGULATION OF THE NETWORK TELEVISION PROGRAM PROCUREMENT PROCESS: AN ATTEMPT TO REGULATE THE LAWS OF ECONOMICS?[*]

Thomas L. Schuessler

- I. Introduction 228
- II. History of Network Regulation 230
  - A. *The Chain Broadcasting Regulations* 230
  - B. *The Network Broadcasting Report* 233
- III. FCC Investigation of Program Procurement 234
  - A. *Network Dominance* 236
  - B. *Network Acquisition of Subsequent Rights in Programming* 243
  - C. *Network Conflict of Interest* 246
  - D. *Network Involvement in Syndication* 247
  - E. *Program Diversity* 248
- IV. The Network Program Procurement Rules 251
  - A. *The Proposed Network Rules* 251
  - B. *The 1970 Network Rules* 254
- V. Analysis of the Commission's Assumptions Concerning Concentration of Economic Control 263
  - A. *The General Program Exhibition Market* 265
  - B. *The Non-Network Program Exhibition Market* 271
  - C. *The Network Exhibition Market* 275
- VI. Analysis of the Commission's Assumptions Concerning Concentration of Creative Control 281
  - A. *Network Programming* 281
  - B. *Non-Network Programming* 282
  - C. *The General Program Exhibition Market* 283

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VII. The Program Procurement Rules 284
- A. *The Prime-Time Access Rule* 286
- B. *The Proposed Rule* 296
- C. *The Financial Interest Rule* 299
- D. *The Network Syndication Rule* 302

VIII. Conclusion 304

Introduction

This is the first of two articles analyzing the Federal Communications Commission's attempt to reduce network dominance of the television program procurement process—the process by which television programs are produced, licensed, distributed, and ultimately exhibited on local stations.[1] This first article focuses on the period between 1959, when the Commission instituted its program inquiry,[2] and 1970 when the Commission adopted rules designed to regulate network program procurement practices.[3] Although most of this article consists of an extensive analysis of the Commission's economic assumptions and conclusions, a significant portion of the article is devoted to a description of the Commission proceedings and the lengthy reports which were released during the course of the program inquiry. This descriptive material is necessary for a complete understanding of the Commission's treatment of the program procurement process, which is essential if the subsequent analysis is to be meaningful.[4]

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[1] The primary official sources of information for this article include: (1) House Comm. on Interstate and Foreign Commerce, Network Broadcasting, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 1 (1958) [hereinafter cited as Network Broadcasting]; (2) FCC, Interim Report by the Office of Network Study, Responsibility for Broadcast Matter (1960), *reprinted in* House Comm. on Interstate and Foreign Commerce, Television Network Program Procurement, H.R. Rep. No. 281, 88th Cong., 1st Sess. 197 (1963) [hereinafter cited as Interim Report]; (3) FCC, Second Interim Report (Part I) by the Office of Network Study, Television Network Program Procurement, *reprinted in* House Comm. on Interstate and Foreign Commerce, Television Network Procurement, H.R. Rep. No. 281, 88th Cong., 1st Sess. 13 (1963) [hereinafter cited as Second Interim Report, Part I]; (4) FCC, Second Interim Report (Part II) by the Office of Network Study, Television Network Program Procurement (1965) [hereinafter cited as Second Interim Report, Part II].

[2] 24 Fed. Reg. 1605 (1959).

[3] These rules consist of the network syndication rule, 47 C.F.R. § 73.658(j)(1)(ii) (1976); the network financial interest rule, 47 C.F.R. § 73.658(j)(1)(i) (1976); and the prime-time access rule, 47 C.F.R. § 73.658(k) (1976).

[4] A detailed account of the Commission's actions regarding program procurement is unavailable elsewhere. An overview of the proceedings prior to 1970 is contained in an article by Ashbrook Bryant, then Chief of the Office of Network Study. *See* Bryant, *Historical and Social Aspects of Concentration of Program Control in Television*, 34 Law & Contemp. Prob. 610 (1969).

The second article[5] will focus on the period between 1970 and 1978, and will deal with the two major rulemaking proceedings initiated by the Commission in an effort to restructure the prime-time access rule[6] and the Commission's treatment of waivers from that rule.[7] The second article will also include an evaluation of the effectiveness of the rules since their adoption in 1970 as well as a detailed analysis of possible alternatives which could have been employed by the Commission to achieve the results which were not achieved by the 1970 rules.

During the program inquiry and the subsequent rulemaking proceeding,[8] a great deal of economic evidence was submitted concerning the relative positions of networks and independent producers in the prime-time television program markets. Based on its analysis of this economic evidence, the Commission concluded that the program procurement process was dominated by the networks to the serious economic detriment of producers who had been "crowded" out of the non-network exhibition market and forced to sell their programs to networks under onerous terms reflecting the oligopsonistic power of the networks. According to the Commission, these restrictive network practices seriously constricted the diversity of prime-time entertainment programming and impaired the ability of local stations to operate in the public interest. However, as this article will demonstrate, the Commission seriously misunderstood the economic realities of the program procurement process and, as a result, adopted rules which had no chance whatsoever to achieve their intended result.

Despite the fact that much of the first article deals with events which occurred eight years ago and relies primarily upon 1968 data, the analysis therein is not solely of historical significance. This analysis not only demonstrates the futility of the Commission's 1970 efforts, but also is intended to serve as a framework for future analysis of similar economic issues. The current relevance of such a framework is underscored by the Commission's recent decision to undertake a new network investigation which will again examine "network dominance" and, more specifically, "the question of whether the networks have maintained anticompetitive policies which unduly restrict the development of other programming sources."[9]

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[5] Schuessler, *The Prime Time Access Rule 1970-1978: An Analysis of Regulatory Failure*, to be printed in Nw. U.L. Rev.

[6] Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule," Report and Order, 44 F.C.C.2d 1081 (1974) [hereinafter cited as PTAR II]; Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule," Second Report and Order, 50 F.C.C.2d 829 (1975) [hereinafter cited as PTAR III].

[7] Between 1971 and 1975, the Commission passed on more than 100 requests for waivers from the requirements of the prime-time access rule.

[8] Competition and Responsibility in Network Television Broadcasting, Notice of Proposed Rulemaking, 45 F.C.C. 2146 (1965) [hereinafter cited as Proposed Rulemaking].

HISTORY OF NETWORK REGULATION

The Chain Broadcasting Regulations

In 1938 the Commission, alarmed at the increasing centralization of power in the radio networks, initiated an investigation "to determine what special regulations applicable to radio stations engaged in chain . . . broadcasting [were] required in the public interest, convenience, or necessity."[10] Three years later the Commission issued its Report on Chain Broadcasting[11] in which it found that forty percent of the nation's radio stations, accounting for ninety-eight percent of the national nighttime wattage and more than one-half of industry revenue, were affiliated with a national network.[12] The report acknowledged the great benefits inherent in network broadcasting[13] but expressed alarm at the virtual absence of compe-

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[9] 42 Fed. Reg. 4992, 4992 (1977). The Commission also noted that the inquiry would focus primarily on another essentially economic issue—the relationship between the networks and their affiliated stations. On June 30, 1977, the Commission stayed the inquiry as a result of the Senate Appropriations Committee's refusal to permit the Commission to reprogram the necessary funds to establish an inquiry staff. This refusal was "based upon a desire to preserve the options of the soon to be named new Chairman of the Commission . . . ." *See* Order Regarding Stay of Inquiry, 42 Fed. Reg. 34913, 34913 (1977). However, a new Chairman has been appointed and has promised to reinstitute the inquiry. *See* BROADCASTING Oct. 3, 1977, *supra* note at, at 34.

[10] Order Instituting Chain Broadcasting Investigation, FCC No. 37 (1938), *reprinted in* FCC, REPORT ON CHAIN BROADCASTING 95 (1941). *Chain broadcasting* is defined in the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p) (1970). The Act also empowers the Commission to "make special regulations applicable to radio stations engaged in chain broadcasting." 47 U.S.C. § 303(i) (1970).

At the time of the investigation, there were four national radio networks owned by three different organizations: NBC, which was (and still is) a subsidiary of RCA and which operated both the "Red" and the "Blue" networks; CBS, which was owned by the Chicago Tribune; and Mutual Broadcasting, which was owned by R.H. Macy & Co. For the early history of networks see National Broadcasting Co. v. United States, 319 U.S. 190, 210-15 (1943); SECOND INTERIM REPORT, PART II, *supra* note 1, at 111; Bryant, *Regulation of Broadcast Networks*, 15 ST. LOUIS U.L.J. 3, 3-11 (1970); Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 557-58 (1957).

[11] FCC, REPORT ON CHAIN BROADCASTING (1941).

[12] *Id.* at 31-32.

[13] The report contained the following explanation:

> The growth and development of chain broadcasting found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or re-

tition among the national networks and their affiliates.[14] After a detailed examination of the complex contractual relationship between the networks and their affiliates, the Commission concluded that there was no reason why broadcasting could not function as a competitive industry:

> If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system.[15]

Finding that many of the abuses of chain broadcasting resulted from restrictive terms in the affiliation agreements between networks and local stations,[16] the Commission adopted rules[17] prohibiting such practices as option time,[18] exclusive affiliation of stations,[19] ter-

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> gional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs.

Id. at 4.

[14] *Id.* at 47-48.

[15] *Id.* at 88-89.

[16] *Id.* at 97.

[17] Prior to 1970, the Commission took the position that the Communications Act did not authorize the direct regulation of networks since networks were not required to be licensed by the Commission. However, the same result was achieved indirectly by prohibiting any licensee from affiliating with any network by means of an agreement which contained any provision prohibited by the rules. The Commission had no difficulty in finding ample authority for such rules:

> We are satisfied that the Commission has jurisdiction to issue the regulation contained in the attached order, both as an exercise of its licensing function in the public interest and under the grant of authority contained in Section 303(i) "to make special regulations applicable to radio stations engaged in chain broadcasting." Either basis alone amply supports our jurisdiction; together they leave no doubt that the power exercised in these regulations is within the clear intent of Congress.

Id. at 80. Although the chain broadcasting rules were originally adopted as indirect restrictions on radio networks, they were subsequently made applicable to television networks. 11 Fed. Reg. 33 (1946).

[18] 6 Fed. Reg. 5258 (1941). Option time provisions entitled the network to insist, upon 28 days notice, that an affiliated station carry network programming during specified time periods. Shortly after its adoption, the Commission amended the rule to permit a station to option as many as three hours during each of four specified daily time segments to one or more networks on a non-exclusive basis provided that the station was given no less than 56 days notice by the network. FCC, SUPPLEMENTAL REPORT ON CHAIN BROADCASTING 9 (1941). Option time provisions were completely prohibited in 1963. 47 C.F.R. § 73.658(d) (1976) (television); Option Time and the Station's Right to Reject Network Programs, Second Report and Order, 34 F.C.C. 1103, 1130 (1963). For a further discussion of option time, see note 54 *infra*.

[19] 6 Fed. Reg. 2282 (1941) (codified at 47 C.F.R. § 73.658(a) (1976) (television)). The exclu-

ritorial exclusivity,[20] and network control of station rates.[21]

The validity of the chain broadcasting rules was upheld by the Supreme Court in *National Broadcasting Co. v. United States*,[22] a landmark opinion defining the extent of the Commission's regulatory authority. NBC and others argued that the Commission lacked regulatory authority to adopt the chain broadcasting rules; that the rules were arbitrary and capricious; that, even if the Communications Act did confer the requisite authority, such a grant constituted an unlawful delegation of legislative power; and that the rules vio-

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sive affiliation provision prohibited an affiliated station from broadcasting programs offered by other networks.

[20] 6 Fed. Reg. 2282 (1941) (codified at 47 C.F.R. § 73.658(b) (1976) (television)). The territorial exclusivity provision prohibited networks from offering to another station in the same market programs which had been rejected by an affiliate.

[21] 6 Fed. Reg. 2282 (1941) (codified at 47 C.F.R. § 73.658(h) (1976) (television)). This rule was directed at provisions in affiliation agreements prohibiting affiliated stations from charging a lower rate for non-network advertising time than the networks charged for network advertising time. The chain broadcasting rules also limited the term of affiliation to one year. This was increased to two years in the Supplemental Report. 6 Fed. Reg. 5258 (1941) (codified at 47 C.F.R. § 73.658(c) (1976) (television)). *See* FCC, SUPPLEMENTAL REPORT ON CHAIN BROADCASTING 4 (1941).

The rules also prevented several other network practices. Network ownership of radio stations was restricted. 6 Fed. Reg. 2282 (1941). For limitations on ownership of television stations, see 47 C.F.R. §§ 73.636, 73.658(f) (1976). Affiliation agreements were prohibited from preventing or hindering a local station from refusing to exhibit network programs which it "reasonably believes to be unsatisfactory or unsuitable" or "contrary to the public interest," or from substituting "a program of outstanding local or national importance." 6 Fed. Reg. 2282 (1941) (codified at 47 C.F.R. § 73.658(e) (1976) (television)). Finally, the operation of more than one network by any network organization was prohibited. 6 Fed. Reg. 2282 (1941). The latter rule was subsequently suspended. The Commission noted that "[S]eparate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate." FCC, SUPPLEMENTAL REPORT ON CHAIN BROADCASTING 14 (1941). Despite the fact that NBC sold its Blue network to ABC in 1943, SECOND INTERIM REPORT, PART II, *supra* note 1, at 176, the network ownership rule was readopted in 1944. 8 Fed. Reg. 16,065 (1943). *See* Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 YALE L.J. 1339, 1394 (1965). For a general analysis of the chain broadcasting rules, see Note, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L.J. 78 (1951); Note, *FCC Regulation of Competition Among Radio Networks*, 51 YALE L.J. 448 (1942). On March 23, 1977, the Commission repealed several of its regulations concerning *radio* network practices, including those limiting or prohibiting exclusive affiliation, option time, terms of network affiliation, and network control over station time rates. 42 Fed. Reg. 16,415 (1977).

[22] 319 U.S. 190 (1943). Shortly after the adoption of the chain broadcasting rules, NBC and others attempted to enjoin the Commission from enforcing them. A three-judge district court, in an opinion by Judge Learned Hand, upheld the Commission's action. 47 F. Supp. 940 (S.D.N.Y. 1942). For a discussion of the chain broadcasting rules and the NBC case, see Barber, *Competition, Free Speech and FCC Radio Network Regulations*, 12 GEO. WASH. L. REV. 34 (1943); Bryant, *supra* note 10, at 19-20; Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 41-45 (1967).

lated the first amendment.[23] Rejecting the arguments that the Commission's regulatory power was narrow, the Court found that "Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio"[24] and that these were "not niggardly but expansive powers."[25] This broad authority included the adoption of the rules in question, which were properly delegated to the Commission and which were not exercised in an arbitrary and capricious manner.

The Court, almost in passing, rejected the appellants' first amendment argument, noting that, by its very nature, broadcasting is a limited channel of communications which is not available to all who wish to be heard over the air and that it is the proper function of the Commission to decide who shall have this opportunity and who shall not, provided that the basis for this choice is proper.[26] Approving the choice implicit in the rules as within the "public interest," the Court held that:

> Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants on some such basis, the issue before us would be wholly different.[27]

The Network Broadcasting Report

Twelve years later, on July 20, 1955, the Commission initiated its second investigation of network practices by creating a committee of commissioners[28] "to determine whether the present operation of television and radio networks and their relationships with stations and other components of the industry tend to foster or impede the development of a nationwide, competitive broadcasting system."[29]

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[23] 319 U.S. at 209.

[24] *Id.* at 217.
Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

[25] *Id.* at 219.

[26] *Id.* at 226-27.

[27] *Id.* at 226.

[28] FCC Delegation Order No. 10 (July 22, 1955), *reprinted in* NETWORK BROADCASTING, *supra* note 1, at 667.

[29] NETWORK BROADCASTING, *supra* note 1, at 1. For a general analysis of this report, see Barrow, *Network Broadcasting—The Report of the FCC Network Study Staff*, 22 LAW & CONTEMP. PROB. 611 (1957) and Keyes, *Recommendations of the Network Study Staff: A Study of Non-Price Discrimination in Broadcast Television*, 27 GEO. WASH. L. REV. 303 (1959).

In addition to the network activities which had previously been dealt with in the Chain Broadcasting Report,[30] the network study committee directed the staff to investigate numerous aspects of network operations involving the production, distribution, and sale of programs for network broadcasting. These included: (1) the effect of the network program selection process on competition among program sources, (2) the capability of independent producers to produce network quality programming, (3) the possibility of network discrimination against independently produced programs carried on the network, and (4) the advisability of permitting networks to obtain financial interests in independently produced programs exhibited on the networks and to engage in program production.[31]

The study committee recommended that the Commission adopt rules prohibiting several network practices, including option time, continued attempts by networks to influence the non-network rates of their affiliates, "must-buy" practices,[32] and network representation of affiliated stations that were not owned by the networks in the sale of non-network time. In addition, the committee recommended that the Commission seek congressional authorization to regulate networks directly.[33] Due to the refusal of some independent producers to provide financial data, however, the staff was unable to include an analysis of the programming issues which were originally within the intended scope of the study.[34] It noted that "[t]he remaining matters involving programming will be the subject of a supplemental report at such time as the necessary information may be obtained."[35]

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[30] *See* notes 18-21 *supra*

[31] NETWORK BROADCASTING, *supra* note 1, at 7.

[32] Prior to 1960, the networks each had some form of "must-buy" or "minimum-purchase" requirement under which an advertiser was required to purchase time on certain specified stations (CBS, NBC) or on a minimum number of stations (ABC). This practice was voluntarily abandoned by the networks without Commission rulemaking. *See* Salant, Fisher, & Brooks, *The Functions and Practices of a Television Network*, 22 LAW & CONTEMP. PROB. 584, 599 (1957).

[33] NETWORK BROADCASTING, *supra* note 1, at 654-61. The Commission subsequently adopted rules abolishing option time, 28 Fed. Reg. 5501 (1963) (codified at 47 C.F.R. § 73.658(d) (1976) (television)), and prohibiting networks from representing affiliated stations that were not owned by the networks in the sale of non-network time, 24 Fed. Reg. 9003 (1959) (codified at 47 C.F.R. § 73.658(i) (1976) (television)).

[34] NETWORK BROADCASTING, *supra* note 1, at 7-8. The FCC subsequently prevailed in its attempt to obtain this data. FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

[35] NETWORK BROADCASTING, *supra* note 1, at 8.

FCC INVESTIGATION OF PROGRAM PROCUREMENT

In 1959, the Commission instituted an investigatory proceeding designed to obtain information and data concerning "the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition . . . ."[36] More specifically, the Commission indicated that it sought information concerning network ownership and control of programming, network involvement in program syndication,[37] and the extent to which networks obtained financial interests in independently produced programs as a precondition to network exhibition.[38]

In 1962, pursuant to the original order for investigation, the Office of Network Study submitted Part I of its Second Interim Report, in which the staff concluded that network program procurement practices "unduly restrict and restrain the competitive development of the market for independently produced network television programs."[39] In 1965, the Commission promulgated proposed rules designed to correct the competitive problems in the program procurement process identified during the course of the inquiry.[40] Five years later, the Commission adopted the proposed rules with some important modifications.[41]

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[36] 24 Fed. Reg. 1605 (1959).

[37] *Program syndication* refers to the "sale" (licensing) and distribution of television programs on a station by station basis. *Off-network syndication* involves the "sale" of programs which were originally exhibited on a network and which are being distributed for exhibition by local stations as "reruns." *First-run syndication* involves the "sale" of programs which have not been previously exhibited on a network and which are being distributed for original exhibition by local stations. A program "sold" in syndication is licensed to as many local stations as possible but only to one station in each market. Commission rules limit such territorial exclusivity to an area 35 miles beyond the city of license. 47 C.F.R. § 73.658(m) (1976).

[38] *See* note 36 *supra*. Nine months after initiating inquiry in response to both the television quiz show scandal and allegations that records were being promoted without proper sponsorship identification, the Commission enlarged the scope of its investigatory proceeding to include a study of the selection and presentation of programming which is not in the public interest and which fails to meet generally accepted standards as to "decency, propriety, fairness, and balance . . . ." 24 Fed. Reg. 9275 (1959). Pursuant to this supplemental order, the Office of Network Study submitted its First Interim Report to the Commission on June 16, 1960. INTERIM REPORT, note 1 *supra*. The Commission also dealt with part of this material in the well-known en banc session. *See* 25 Fed. Reg. 7291-96 (1960). Most of the material discussed in these reports is not relevant to the program procurement process and will not be discussed.

[39] Letter of Submittal from Ashbrook P. Bryant, Chief, Office of Network Study, to the Commission (Nov. 28, 1962), *reprinted in* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, TELEVISION NETWORK PROGRAM PROCUREMENT, H.R. REP. No.281, 88th Cong., 1st Sess. 11 (1963).

[40] Proposed Rulemaking, note 8 *supra*. Four months later the Office of Network Study submitted Part II of its Second Interim Report on television network program procurement. SECOND INTERIM REPORT, PART II, note 1 *supra*. The main purpose of this report was to provide documentation for the "statements, conclusions and suggestions" contained in Part I

Network Dominance

Based on information obtained in the program inquiry and the rulemaking proceeding, the Commission concluded that the television networks dominated the program procurement process. It stated:

> The information and data before the Commission appear to establish that network corporations, with the acquiescence of their affiliates, have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs.[42]

Although the Commission did not clearly define the relevant economic market, it is clear that it was concerned with network dominance of the markets available to the independent program producer for the "sale" of prime-time[43] entertainment programming in the top fifty television markets in the country.[44] Essentially, the Commission viewed the problem as one involving competition between networks and independent producers for access to prime-time on television

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of the report. This documentation consists of excerpts from the testimony of those directly concerned with the program production and procurement process. For a synopsis of the programming inquiry, see Bryant, note 4 *supra*.

[41] Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382 (1970) [hereinafter cited as PTAR I].

[42] Proposed Rulemaking, *supra* note 8, at 2147.

[43] The Commission stated that access to prime time was "the key to a healthy syndication industry because it is . . . the time of day when the available audience is by far the greatest." PTAR I, *supra* note 41, at 394.

[44] The Commission focused on the top 50 markets because they contain 75% of the nation's television audience. The Commission concluded that access to stations in these markets was essential to form an adequate base of stations for "a healthy syndication industry . . . capable of producing prime-time quality programs . . . ." PTAR I, *supra* note 41, at 386. The Commission noted that "while a program need not be shown in all 50 markets to be financially successful, it must be shown in a substantial number of these markets." *Id.* at 394 n.32. The top 50 markets are to be determined by reference to American Research Bureau (ARB) figures for total homes viewing in the market during prime time. *See* Request for Waiver of the Prime Time Access Rule (Stations in the Mountain Time Zone), Memorandum Opinion and Order, 32 F.C.C.2d 66 (1971). The Commission was also primarily concerned with entertainment programming. PTAR I, *supra* note 41, at 385. Hereafter, unless otherwise indicated, the discussion will be limited to prime-time entertainment programming on stations in the top fifty markets.

stations in the top fifty markets. The market position of each was analyzed in terms of the average number of weekly hours devoted to network or first-run syndicated programming on such stations. In these terms the Commission found that the networks, by virtue of their economic and creative control over both network and off-network programming, had gained a position of almost total dominance.

Non-Network Exhibition—Independent producers attempt to sell their first-run syndicated programming to both network-affiliated[45] and independent stations.[46] In view of the fact that the independent stations, having no network affiliation, exhibit virtually no network programming,[47] the Commission felt that these stations should be the "backbone of the syndication market."[48] However, it found that first-run syndicated programming on independent stations was rapidly being replaced with off-network programming which was economically and creatively controlled by the networks.[49] Furthermore, the Commission noted that only fourteen of the top fifty markets had one or more independent Very High Frequency (VHF) stations.[50] Thus, the Commission concluded that access to such stations alone would not provide an adequate number of stations to support a healthy syndication industry.[51]

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[45] An *affiliated station* is one which has contractually "affiliated" with one of the three national networks. Affiliates are selected "on the basis of their ability to provide the widest possible coverage without substantial duplication." Blake & Blum, *supra* note 21, at 1343. In 1970, ABC had 153 primary affiliates, CBS had 202 primary affiliates, and NBC had 184 primary affiliates. [1970] BROADCASTING Y.B. E8-E15.

[46] Although networks produce virtually all of their own news and public affairs programming, they produce almost none of the entertainment programs exhibited on their facilities. Proposed Rulemaking, *supra* note 8, at 2152.

[47] In the rare event that an affiliated station fails to "clear" its time for the network program, which it must have the right to do under 47 C.F.R. § 73.658(e) (1976), another station in the same market may exhibit the network program. *Id.* § 73.658(b).

[48] PTAR I, *supra* note 41, at 385.

[49] Proposed Rulemaking, *supra* note 8, at 2156-57. The Commission found that the percentage of prime time devoted to first-run syndicated programming on independent stations declined from 35.5% in 1958 to 25.4% in 1968, while the percentage of such time devoted to off-network programming increased from 2.8% to 32.8% over the same period. PTAR I, *supra* note 41, at 385.

[50] PTAR I, *supra* note 41, at 386. The Commission did not consider the fact that there were an additional 22 markets in the top 50 with one or more independent Ultra High Frequency (UHF) stations. *See* ARTHUR D. LITTLE, INC., TELEVISION PROGRAM PRODUCTION, PROCUREMENT, DISTRIBUTION AND SCHEDULING, 147 (Table 61) (1969) [hereinafter cited as 1969 LITTLE REPORT]. This was undoubtedly due to the fact that UHF stations operate at a distinct disadvantage vis-a-vis Very High Frequency (VHF) stations due to deficient electromagnetic propagation characteristics and because, at that time, many television sets did not have UHF tuners. *See* BESEN, THE VALUE OF TELEVISION TIME AND THE PROSPECT FOR NEW STATIONS (1973); KRASNOW & LONGLEY, THE POLITICS OF BROADCAST REGULATION 97 (1973); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J.L. & ECON. 207 (1972); Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 LAW &

The Commission also concluded that independent producers had virtually no access to the affiliated stations, which in 1969 included 153 (68.3 percent) of the 224 television stations in the top fifty markets. This lack of access occurred because most of the prime-time programming exhibited on these stations consisted of programs provided by the networks[52] and because the percentage of non-network time devoted to off-network programming on such stations was rapidly increasing.[53] The Commission concluded that the inherent advantages of the networks in competition for prime time on the affiliated stations constituted a major obstacle to the redevelopment of a healthy independent syndication industry even in the absence of the now-proscribed option time clauses.[54] The Commission specified four advantages flowing from the network-affiliate relationship: (1) the natural tendency of affiliated stations to do more business with their dominant supplier, (2) the simplified network program distribution system, (3) the economies resulting from the affiliation agreement itself, and (4) the economies of scale networks can offer

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Contemp. Prob. 535 (1969); Note, *The Darkened Channels: UHF Television and the FCC*, 75 Harv. L. Rev. 1578 (1968).

[51] PTAR I, *supra* note 41, at 386.

[52] Networks generally offered a prime-time schedule consisting of three and one-half hours of network programming per night. *Id.* at 395. According to the Commission, affiliated stations broadcast, or "cleared," more than 94% of all prime-time programming offered by the networks. Proposed Rulemaking, *supra* note 8, at 2149 n.14. The Commission also found that in 1968 affiliated stations carried an average of only 3.3 to 4.7 hours per week of non-network, prime-time programming, depending on market size. PTAR I, *supra* note 41, at 385.

[53] The Commission found that the percentage of non-network time devoted to off-network programming on affiliated stations increased from 4.8% in 1958 to 19.6% in 1968, while the percentage of non-network time devoted to first-run syndication decreased on such stations from 38% to 17% over the same period. PTAR I, *supra* note 41, at 386.

[54] *Id.* at 394. Option time clauses were a standard provision in contracts between the networks and their affiliates whereby the affiliated stations agreed to broadcast all sponsored network programs which were offered during designated hours. The Commission concluded that option time was not in the public interest and eliminated it. Option Time and the Station's Right to Reject Network Programs, Second Report and Order, 34 F.C.C. 1103, 1130 (1963). The Commission found that option time restricted independent producers' access to certain broadcast hours and concluded that this anticompetitive effect was not in the public interest, reasoning that option time was not necessary to successful network operations and that it acted as a restraint on the licensee's responsibility in program selection. Option time was discussed by the Commission in FCC, Report on Chain Broadcasting 62-65 (1941). *See also* Network Broadcasting, *supra* note 1, at 279-400; Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 Duke L.J. 282, 289-92; Besen & Soligo, *The Economics of the Network—Affiliate Relationship in the Television Broadcasting Industry*, 63 Am. Econ. Rev. 259, 265-66 (1973); Blake & Blum, *supra* note 21, at 1395-97; Schwartz, *Antitrust and the FCC: The Problem of Network Dominance*, 107 U. Pa. L. Rev. 753 (1959).

advertisers.[55]

The Commission attributed the substantial loss of sales by independent producers to their lack of a unified distributional system and not to superiority in the quality of network programs. This conclusion followed from the fact that almost all network entertainment programs were produced by independent producers.[56]

Network Exhibition—With the rapid contraction of the nonnetwork exhibition market, the Commission found that independent producers were forced to look to the network exhibition market for program sales. Prior to 1958, there were two potential purchasers of prime-time programming for network exhibition: the three networks themselves and a large number of national advertisers[57] who would then purchase time from one of the networks for exhibition of the program.[58] However, the Commission found that, since the 1957-58 television season, the number of programs purchased directly by advertisers[59] began to decline sharply, while the number of programs licensed directly to the networks,[60] and controlled economically and creatively by them, rose concomitantly. Thus, in 1957, 35.6 percent of all prime-time network entertainment programming during selected sample weeks consisted of independently produced programs licensed to advertisers, while only 43.2 percent of prime-time programming consisted of programs licensed directly to the three networks.[61] By 1968, however, only 3.8 percent of network prime-time entertainment programming consisted of independently produced programs purchased by advertisers while the percentage of prime-time programming licensed by independent producers directly to networks increased to 92.1 percent.[62]

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[55] PTAR I, *supra* note 41, at 386-87.

[56] *Id.* at 387.

[57] The Commission estimated that there were 50 to 100 such advertisers in this potential market. *Id.*

[58] *See* SECOND INTERIM REPORT, PART II, *supra* note 1, at 218-19, 721-22. As a matter of policy, networks would only sell broadcasting time to advertisers and political candidates. *See* Proposed Rulemaking, *supra* note 8, at 2150 & n.15. Thus, in testimony taken during the programming inquiry, an executive from NBC stated that NBC would not sell time to an independent producer who wished to place a series on a network. SECOND INTERIM REPORT, PART II, *supra* note 1, at 194, 721. *See also* SECOND INTERIM REPORT, PART I, *supra* note 1, at 97.

[59] Network programs licensed by advertisers from producers were known as "advertiser-licensed" programs.

[60] Network programs licensed from producers by a network were known as "producer-licensed" programs.

[61] PTAR I, *supra* note 41, at 390. The remaining 21.2% was produced by the networks themselves. *Id.* These figures differ slightly from those found in the 1969 LITTLE REPORT, *supra* note 50, at 5-8 (Table 2). The Commission indicates that their figures were based on data submitted directly by the three networks. PTAR I, *supra* note 41, at 389 n.17.

According to the Commission and the network study staff, this dramatic change was the result of the adoption of new advertising techniques and network scheduling practices. As the data indicate, prior to 1968 it was common for a single sponsor to purchase one or more entertainment series from a producer and utilize the advertising time during each episode to exhibit its own commercial messages.[63] However, as the result of substantial increases in production costs,[64] caused in part by the switch to longer program formats[65] and the use of film as opposed to live programming,[66] the number of national advertisers who could afford sole or dual sponsorship of network programs rapidly diminished.[67] At the same time, advertising research indicated that it was more effective to diversify advertising investments in shorter units of commercial time, known as "participations," which were placed in a number of different programs.[68] As a result, most national advertisers stopped sponsoring single programs and began to rely on short thirty- or sixty-second participations.[69]

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[62] PTAR I, *supra* note 41, at 390. Programming produced by the networks dropped to 4.1%. *Id.*

[63] *Id.* At one time Procter and Gamble was the sole sponsor of 12 regularly scheduled series on network television. *Id.* at 408 n.26.

[64] Testimony indicated that the cost of an hour-long program increased from $70,000 in 1956 to $110,000 in 1961. SECOND INTERIM REPORT, PART II, *supra* note 1, at 259. By 1968, the average production cost of an hour-long program had risen to $195,730. TELEVISION MAGAZINE, May, 1968, at 22-25.

[65] The percentage of prime-time hours consisting of hour-long programs increased from 30.1% in 1957 to 76.7% in 1968. PTAR I, *supra* note 41, at 390 n.19. The staff noted that almost all of these hour-long programs were " 'controlled' by, 'committed by, financed by and placed in the time periods and offered for sale' to advertisers by networks managers 'as such' on a 'take it or leave it basis' " and that the transition to hour-long programs was "[a] substantial factor contributing to economic and creative control of program markets by networks." SECOND INTERIM REPORT, PART II, *supra* note 1, at 733.

[66] This change was made because the use of film (or videotape) permits subsequent syndication of programs and because it makes possible programming which could not have been undertaken in a "live" format. SECOND INTERIM REPORT, PART I, *supra* note 1, at 76; SECOND INTERIM REPORT, PART II, *supra* note 1 at 325. According to the staff the "massive shift" to film led to the almost complete domination of the syndication market by off-network products. SECOND INTERIM REPORT, PART II, *supra* note 1, at 760.

[67] Leonard points out that in 1967 the estimated annual expense of supplying an entire program was $12.4 million in time and program costs for a full hour evening show and $6.7 million for a half-hour series. As a result, he found that only 33 advertisers had budgets large enough to buy a half-hour series and that only 14 could afford an hour-long series. Leonard, *Network Television Pricing: A Comment*, 42 J. BUS. U. CHI. 93, 94 (1969). *See also* 1 ARTHUR D. LITTLE, INC., TELEVISION PROGRAM PRODUCTION, PROCUREMENT AND SYNDICATION 25 (1966) [hereinafter cited as 1966 LITTLE REPORT].

[68] *See* Blake & Blum, *supra* note 21, at 1346-47.

The staff also concluded that the networks were actively seeking to gain control over their programming by obtaining the network exhibition rights to as many of the prime-time entertainment programs exhibited on the networks as possible in order to be able to ensure the scheduling of programs which appealed to mass audience.[70] In comments filed with the Commission, however, the networks argued that the changes in advertising methods had not been brought about by the networks but were solely the result of determinations by national advertisers that dispersal of commercials over several programs in the form of participations was more effective and efficient than sole or dual sponsorship.[71] Furthermore, the networks claimed that they had no motive to reject programs licensed to advertisers. First, they argued that revenues from advertiser-supplied programs were greater than revenues from network-licensed programs.[72] Second, they noted that the switch to network-licensed programs had increased network risks significantly since they now must purchase the program before selling commercial time to advertisers.[73]

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[69] In 1970, the Commission noted that the trend was towards 30-second spots. PTAR I, *supra* note 41, at 390. This was primarily due to the fact that 30-second commercials were found to be almost as effective as 60-second spots. *Id.* at 408 n.22.

[70] INTERIM REPORT, *supra* note 1, at 327. For a discussion of the reasons why the networks seek to maximize audiences, see text accompanying notes 345-49 *infra*. It has also been suggested that the networks facilitated the change to packager-licensed programs as a contractual method of vertical integration which would avoid the regulatory action which might be provoked if the networks expanded their own program production activities. Long, *Antitrust and the Television Networks: Restructuring Via Cable TV*, 6 ANTITRUST L. & ECON. REV. 99, 105 (No. 4, 1973). *See also* OWEN, BEEBE, & MANNING, TELEVISION ECONOMICS 20 (1974); Blank, *Television Advertising: The Great Discount Illusion, or Tonypandy Revisited*, 41 J. BUS. U. CHI. 10, 20-22 (1968); Crandall, *The Economic Effect of Television-Network Program "Ownership,"* 14 J.L. & ECON. 385 (1971). The staff also concluded that the increased use of hour-long programs and participations was not without benefit in that it enabled smaller advertisers to purchase national television time. SECOND INTERIM REPORT, PART II, *supra* note 1, at 733. However, the staff warned that the practice had been carried to extremes and had become "a highly effective implement of concentration of program control" which tended to discourage diversity "especially since almost all hour-long film series are consciously designed . . . for bulk circulation." *Id.* at 734.

[71] PTAR I, *supra* note 41, at 407.

[72] The staff rejected the argument that networks had suffered large "program" losses as the result of the switch to producer-licensed programming. The argument was based on a comparison between program costs to the networks and revenues received from advertisers for "program charges." However, the staff noted that the networks failed to take into account revenues received from advertisers for use of network time and that when both time and program revenues are examined it is clear that network revenues and profits were rapidly expanding. SECOND INTERIM REPORT, PART II, *supra* note 1, at 739. The staff found that, since the network testimony in 1962, total net income of the networks from network operations had almost trebled. *Id.* at 17. *See also* Proposed Rulemaking, *supra* note 8, at 2156 n.37.

Despite the fact that the leading advertisers attributed the increase in hour-long programming to the networks[74] and the fact that counsel for CBS admitted that networks controlled the creative process in order to attract large circulation advertisers,[75] the Commission concluded that "[t]he testimony before us is in conflict as to whether the increased control has been used in order to maintain bulk circulation, or whether it has been due to the increased productions [*sic*] costs of 'quality' network programs, or to the evolution of more sophisticated marketing techniques and advertising practices."[76] However, the Commission did find that the switch from advertiser-licensed to producer-licensed programming had greatly facilitated network control over prime-time programming.[77] The Commission further concluded that this concentration of program control was not in the public interest since: (1) it adversely affected diversity of programming;[78] (2) it impaired the ability of independent producers to compete with the networks or to deal on an equal basis with them;[79] (3) it tended to retard the development of the non-network syndication industry which was thought to be necessary to the development of new Ultra High Frequency (UHF) stations;[80] and (4) it placed networks in a position where they had a clear conflict of interest in choosing, for original network exhibition, between programs in which they had subsequent financial interests and programs in which they had no such interests.[81]

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[73] SECOND INTERIM REPORT, PART II, *supra* note 1, at 267.

[74] PTAR I, *supra* note 41, at 408. However, at least one advertiser, Charles Underhill of United States Steel, testified that the result was accidental. SECOND INTERIM REPORT, PART I, *supra* note 1, at 82. For a summary of the advertiser's testimony, see SECOND INTERIM REPORT, PART II, *supra* note 1, at 742-55. Commissioner Cox, in his concurrence to the adoption of PTAR I, note 41 *supra*, argued that the networks' control over prime-time network programming, with the concomitant demise of first-run syndication, occurred as the result of the extension of network programming into the 10:30 to 11:00 p.m. period and not from the switch to hour-long programming and participations, which, he asserts, came later. *Id.* at 417 (Cox, Comm'r, concurring).

[75] PTAR I, *supra* note 41, at 391.

[76] Proposed Rulemaking, *supra* note 8, at 2153 (footnotes omitted). *See also* SECOND INTERIM REPORT, PART II, *supra* note 1, at 735.

[77] PTAR I, *supra* note 41, at 387. The staff's conclusion is reported in SECOND INTERIM REPORT, PART I, *supra* note 1, at 97-98. *See also* Johnson, *Freedom to Create: The Implications of Antitrust Policy for Television Programming Content*, 1970 LAW & SOC. ORD. 337. For a concise description of the program development process, see SECOND INTERIM REPORT, PART II, *supra* note 1, at 217-18.

[78] Proposed Rulemaking, *supra* note 8, at 2157. The Commission noted that "[a] diversification of economic interest and power in this area is a cardinal principle of the public interest standard of the Communications Act." *Id.*

[79] "In the top 50 markets, which are the essential base for independent producers to market programs outside the network process, they are at such a serious disadvantage that prime time first run syndicated programming has virtually disappeared." PTAR I, *supra* note 41, at 394 (footnote omitted).

[80] The staff noted that if the anticipated new UHF stations are to succeed, they will have to be able to compete with existing network-affiliated VHF stations. Given the economic barriers

Network Acquisition of Subsequent Rights in Programming

According to the Commission, the lack of a national advertiser market and the disappearance of the first-run syndication market left producers with only one viable alternative—licensing their programs to the networks for network exhibition. However, the Commission found that, in the process of licensing their programs to networks, producers were almost invariably required to cede a substantial share of the subsequent rights[82] in these programs to the networks as a *quid pro quo* for network exhibition.[83] The Commission noted that data acquired during the program inquiry and the rulemaking proceeding revealed that there had been a significant increase in network acquisition of subsequent rights from 1957 to 1967[84] and that network power was such that neither producers who had succeeded in selling programs to networks over a period of several years nor the major motion picture producers[85] had been able to secure a

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to the creation of a fourth network, these new UHF stations will be unable to acquire network affiliation, and thus "the ultimate answer for the program procurement problem of nonaffiliated stations must be found in a greatly expanded independent syndication industry—an industry which is financially competent to provide risk capital to produce programs of a 'quality' comparable to those which presently are available for network exhibition." Second Interim Report, Part II, *supra* note 1, at 768. The Commission has long been concerned with obstacles to the growth and development of UHF stations. *See* note 50 *supra.*

[81] Proposed Rulemaking, *supra* note 8, at 2157.

[82] The Commission noted that these rights included "the right to distribute the programs or series in domestic syndication and in foreign markets; the right to share (usually 50% . . .) in the profits from domestic and foreign syndication sales; exploitation rights and share of profits in merchandising, and the right to share in other non-broadcast interests (e.g., motion pictures, books, magazine stories and articles, phonograph records and plays derived from the programs)." *Id.* at 2151. *See also* Second Interim Report, Part I, *supra* note 1, at 65; Second Interim Report, Part II, *supra* note 1, at 210. In view of the fact that in 1967 the revenues derived from the non-broadcast rights amounted to only five percent of network syndication revenues, distribution rights and syndication profit shares were the most important of the subsequent rights. Crandall, *supra* note 70, at 390.

[83] Proposed Rulemaking, *supra* note 8, at 2151.

[84] The percentage of producer-licensed programming in which networks acquired domestic profit shares increased from 31.9% in 1957 to 65.4% in 1967. The percentage of such programming in which networks acquired domestic distribution rights increased from 15.9% to 23.8% over the same period. PTAR I, *supra* note 41, at 392.

[85] MGM, Paramount, Screen Gems, Twentieth Century Fox, United Artists, Universal Pictures, Walt Disney, and Warner Brothers are these major motion picture producers. *Id.* at 388. United Artists subsequently withdrew from television production. A. Pearce, The Economic

favorable bargaining position vis-a-vis one-time producers.[86] The Commission also found that producers were often "forced" to operate at a deficit since they were unable to recover their program production costs from the license fees they received from the networks.[87]

Thus, the Commission concluded that independent producers were at a serious disadvantage. In order to obtain the network exhibition vitally necessary to establish the value of their programs in domestic and foreign syndication, independent producers had to bargain with the networks who were also their competitors in the syndication business,[88] a process which often resulted in their being compelled to grant the networks significant financial interests in the subsidiary rights in their programs.[89]

Noting the dramatic increase in network acquisition of syndication rights, the staff pointed out that if independent producers were not required to cede these profitable rights to the networks in order to obtain network exhibition, they would be able to share in the "risk" of production, their motivation to expand their operations would be increased, and "[i]ndividual initiative and business acumen would then replace, in large measure, the favor of network managers as credentials of entry to television program markets."[90] Furthermore, the staff noted that, if the profitability of independent producers was substantially increased, the networks would be "relieved of a large part of the 'enormous risks' in financing program production which they now assert as economic justification for their acquisition of various kinds of subsidiary interests in the programs they finance for network exhibition."[91]

CONSEQUENCES OF THE FEDERAL COMMUNICATIONS COMMISSION'S PRIME-TIME ACCESS RULE ON THE BROADCASTING AND PROGRAM PRODUCTION INDUSTRIES 102 (1973).

[86] PTAR I, *supra* note 41, at 387-88. Of the 27 series sold to the networks by the major movie producers in 1964, the networks acquired domestic distribution rights in 4 (14.8%) and domestic profit shares in 23 (85.2%). *Id.*

[87] *Id.* at 388, n.16. Proposed Rulemaking, *supra* note 8, at 2150-51.

[88] Prior to the adoption of the network syndication rule in 1970, all three networks maintained a syndication division which engaged in domestic and foreign syndication in competition with independent syndicators, many of whom were the large program producers. Proposed Rulemaking, *supra* note 8, at 2155.

[89] *Id.* According to the staff, however, the producers denied that they were required to cede such rights in order to obtain network exhibition of their programs, although MCA did testify that "it was 'usually' necessary to cede" subsequent rights when attempting to secure network exhibition of a new untried program. PTAR I, *supra* note 41, at 393 n.30. Some, especially the major motion picture companies, testified that they were able to undertake their own financing without network "risk" capital but "preferred" for business reasons to accept network financing and to grant the networks profit sharing rights.

[90] SECOND INTERIM REPORT, PART II, *supra* note 1, at 769.

[91] *Id.*

During the programming inquiry, the networks "vigorously denied" that they insisted on the acquisition of subsequent rights as a *quid pro quo* to network exhibition, maintaining that they only sought to obtain interests in the subsequent rights to programming in those instances where they assumed substantial economic risks, either by virtue of providing developmental financing to the producer or for assuming the "risk" of selling commercial time for the program to advertisers.[92] In the inquiry, network officials testified that they were required to make financial commitments six to nine months in advance for a minimum of twenty-six episodes and that the advertising for these programs was frequently not completely sold when the series began.[93] Furthermore, they testified that if the series failed and the sponsors, who were often only committed for thirteen-week cycles,[94] withdrew from the program, the networks had to absorb the committed costs.[95]

The Commission concluded that network acquisition of subsequent rights in independently produced programming was not necessary. First, it pointed out that income derived from domestic and foreign syndication accounted for only a small percentage of network revenues and profits.[96] Next, it noted that any "risk" undertaken by the networks in conjunction with the sale of advertising time was essentially non-existent in view of the high demand for network advertising time.[97] Finally, it concluded that acquisition of subsequent rights was not essential to the formulation of a prime-time programming schedule.[98]

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[92] *Id.* at 220 (CBS); *id.* at 267 (NBC); *id.* at 302 (ABC); SECOND INTERIM REPORT, PART I, *supra* note 1, at 68-69 (NBC); *id.* at 71 (CBS); *id.* at 73 (ABC). The staff also noted that the Attorney General of the United States had investigated the alleged network tie-in practices prior to the beginning of the program inquiry. The Assistant Attorney General in charge of the Antitrust Division suggested that the matter "might more appropriately be handled in the first instance, at least, through the Commission's authority, rather than through action under the antitrust laws." *Id.* at 114. At that time the Commission concluded that the evidence was "inconclusive" and declined to take action. *Id.*

[93] SECOND INTERIM REPORT, PART I, *supra* note 1, at 71 (NBC); *id.* (CBS); *id.* at 74 (ABC). *See also* Proposed Rulemaking, *supra* note 8, at 2153 n.29. This "risk," according to NBC, amounted to $2,500,000 annually for a half-hour series. SECOND INTERIM REPORT, PART II, *supra* note 1, at 267.

[94] NBC officials noted that, in the case of advertiser-licensed programs, advertisers committed themselves for 39 or 52 weeks. SECOND INTERIM REPORT, PART II, *supra* note 1, at 260.

[95] Officials from NBC testified that "if the series is even below the mid-range of audience success, we may have to reduce the price to advertisers below our cost to maintain sales, or continue the program with partial sponsorship, or both." *Id.* at 259.

[96] Proposed Rulemaking, *supra* note 8, at 2156. The Commission noted that the total revenue from network domestic and foreign syndication of packager-licensed programs in which the networks had acquired subsequent financial interests "accounted for less than one per cent of the combined revenues from the sale of time, talent and program material to advertisers." *Id.* at 2155 n.32.

[97] *Id.* at 2151 n.23. The Commission quoted the President of CBS as stating that "[i]f the

The Commission also found that network acquisition of subsequent rights in independently produced programming adversely affected the public interest because such subsequent rights were economically essential to a viable independent production industry capable of producing programs for first-run syndication competitive with network programming.[99] The Commission also rejected the networks' argument that no independent producer could afford to produce programs solely for first-run syndication. It noted that several producers had stated that if it were not necessary to give the networks a substantial share of their profits, they would be eager to compete in this market.[100] In the face of conflicting testimony the Commission concluded:

> [T]he matter cannot be determined with absolute certainty short of some operational experience under competitive conditions. The likelihood that independent production will succeed is sufficiently great, in our judgment, that it should be given an opportunity. The rule can readily be changed or rescinded if it fails to achieve its purpose.[101]

Network Conflict of Interest

In its Second Interim Report, the staff also concluded that network acquisition of subsequent rights in producer-licensed network programming raised serious conflict of interest problems which adversely affected the networks' obligation to exhibit programming in the public interest. Since the subsequent rights acquired so frequently by the networks had no value unless the program was chosen for network exhibition, the staff found that the networks had compelling economic motives to select for exhibition programs in which they had acquired such rights as opposed to advertiser-licensed programs in which they had no such rights.[102] Although the networks did not deny that they acquired subsequent rights in programs licensed from producers, they maintained that they did so only in return for assuming various financial risks;[103] and they vigor-

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Surgeon General's report on smoking leads to decline in cigarette advertising, CBS will be able to more than off-set such losses by acquisition of new advertising business." *Id.*

[98] *Id.* at 2161. The Commission also concluded that network risks "will be diminished to the extent that the financing of program production is taken over by other sources of risk money." *Id.* at 2158.

[99] PTAR I, *supra* note 41, at 398.

[100] *Id.* at 396.

[101] *Id.* at 396-97.

[102] SECOND INTERIM REPORT, PART I, *supra* note 1, at 76, 103.

[103] The staff pointed out, however, that the potential for bias in program selection is en-

ously denied that the existence or nonexistence of network financial interests in a program was a material factor in their program selection process.[104] The networks argued that they select programs which will benefit both national advertisers and the public and that any other method of program selection would be "economic suicide" in view of the highly competitive nature of network television.[105]

Despite these protestations, the Commission found a direct relationship between programs chosen for network exhibition and programs in which the networks acquired subsidiary rights and concluded that networks accepted virtually no entertainment programming in which they had not acquired financial interests.[106] The Commission observed that even a potential conflict of interest would warrant the elimination of the practice.[107]

Network Involvement in Syndication

The Commission also expressed concern with the involvement of networks in the syndication of off-network programming. Although network syndication revenue was small in comparison to overall network income, the Commission found that network sales in this area were rapidly increasing and that the networks accounted for 23.6 percent of overall sales in this market in 1967.[108]

The Commission concluded that the involvement of networks in domestic syndication was not in the public interest since it placed them in the position of selling non-network programming to independent stations in competition with their own network programming being exhibited on affiliated stations in the same market. The Commission further concluded that the network-affiliate relationship[109] gave networks an undue advantage over independent syndi-

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hanced, not diminished, by the presence of an actual financial need to recoup investment; *i.e.*, the stronger the motivation for acquiring subsidiary rights, the greater the potential for bias in program selection to insure that the rights so obtained will have value. *Id.* at 103-04.

[104] PTAR I, *supra* note 41, at 404; SECOND INTERIM REPORT, PART II, *supra* note 1, at 266 (NBC); *id.* at 302 (ABC).

[105] SECOND INTERIM REPORT, PART I, *supra* note 1, at 66.

[106] PTAR I, *supra* note 41, at 393; Proposed Rulemaking, *supra* note 8, at 2157.

[107] PTAR I, *supra* note 41, at 394.

[108] *Id.* at 393.

[109] *Id.* at 384 n.8. Each network owns five of its VHF affiliates, the maximum allowed under Commission rules. 47 C.F.R. § 73.636(a)(2) (1976). *See also id.* § 73.658(f). These are known as the "owned and operated" stations and are found in the largest markets in the country. Each network owns its affiliated station in the top three markets (New York, Los Angeles, and Chicago). In addition, ABC owns its affiliates in Detroit (sixth largest market) and San Francisco (seventh); CBS owns its affiliates in Philadelphia (fourth) and St. Louis (twelfth);

cators in selling off-network programming to these affiliates.[110] Although the Commission found no evidence to indicate that the networks had actually taken advantage of this relationship, it concluded that the potential for abuse in these situations would be eliminated if networks were prohibited from engaging in domestic syndication.[111]

The Commission and the staff also concluded that a rule barring networks from engaging in domestic syndication would not adversely affect the public interest in maintaining economically viable networks since network financial returns from acquisition of subsequent rights were small in comparison to overall network income.[112] Further, such a rule would enhance the ability of independent producers to increase revenues, thereby enabling them to finance first-run productions for the network market and reduce their reliance upon network financing.[113]

Program Diversity

According to the Commission, virtually all of the previously discussed problems found in the program procurement process tended to reduce the opportunity for diversity in television programming. In the Commission's words: "The total effect . . . has been a marked tendency to centralize control of what the American public may see and hear through television in network corporations and thus to hamper the competitive development of 'diverse and antagonistic' sources for television program service."[114]

Thus, the Commission found that, as a result of the switch from advertiser-licensed to producer-licensed network programming, networks had gained almost complete creative control over network programming.[115] This was because the contractual arrangements between networks and producers "usually accord network corporations

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and NBC owns its affiliates in Cleveland (eighth) and Washington, D.C. (ninth). Broadcasting Y.B. A-114, A-115, A-118 (1970).

[110] PTAR I, *supra* note 41, at 394.

[111] *Id.* at 398.

[112] *Id.* at 392 n.28; Second Interim Report, Part I, *supra* note 1, at 104.

[113] Second Interim Report, Part I, *supra* note 1, at 104-05.

[114] Proposed Rulemaking, *supra* note 8, at 2154. *See* Second Interim Report, Part II, *supra* note 1, at 758-59. The Commission's concern with diversity predates the programming inquiry by many years. For example, in the Chain Broadcasting Report of 1941, the Commission stated that: "If radio broadcasting is to serve its full function in disseminating information, opinion and entertainment, it must bring to the people of the nation a diversified program service." FCC, Report on Chain Broadcasting 4 (1941).

[115] In 1968, 92.1% of all network prime-time entertainment was producer-licensed while an additional 4.1% was network-produced. PTAR I, *supra* note 41, at 390.

the right to participate in the creative process to the extent necessary to assure themselves and mass advertisers that the program or series will initially be designed to attract large circulation and that subsequent episodes of a series will adhere to the 'formula' originally designed."[116] Furthermore, the Commission found that network creative control extended to a substantial amount of non-network programming since off-network programming, which had originally been produced under network control, constituted "a principal staple of the non-network program market."[117]

In Part II of the Second Interim Report the staff noted that television had not always been so deficient in diversity of programming. During the programming inquiry, many witnesses testified that in its formative years (1950-1970) the networks offered schedules which served not only the maximum audience but also significant minority audiences as well.[118] These witnesses pinpointed the 1957-58 television season as the end of reasonable diversity on network television and the beginning of schedules dominated by action-adventure and other stereotyped film series to the exclusion of such diverse, advertiser-licensed programming as music, children's shows, and serious drama.[119] According to their testimony, the reasons for this transition included: (1) a change in network policy, whereby networks substituted "purely commercial considerations based on circulation and 'cost per thousand' for considerations of overall service to all advertisers and to the various publics, as the dominant motives in the plan and design of network schedules;[120] (2) increased program costs, re-

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[116] Proposed Rulemaking, *supra* note 8, at 2151. These production "formulas" " 'set' the characters, 'freeze' theme and action and limit subject matter to 'tested' commercial patterns." *Id.* at 2151 n.24.

[117] PTAR I, *supra* note 41, at 389.

[118] SECOND INTERIM REPORT, PART II, *supra* note 1, at 535.

[119] *Id.* at 199, 535. It was also pointed out that many advertiser-licensed programs have been considered by the critics to have been superior to programs licensed directly to the networks. *Id.* at 371-72; SECOND INTERIM REPORT, PART I, *supra* note 1, at 79.

[120] SECOND INTERIM REPORT, PART II, *supra* note 1, at 535. *See* SECOND INTERIM REPORT, PART I, *supra* note 1, at 99. David Susskind, a producer of long experience in television, stated with respect to the decline in diversity programming:

> The first thing that's caused it, in my mind, is the deathgrip on programming by the networks; where formerly in that Golden Age of Television it was possible to sell a good program or an interesting program to a host of advertisers or advertising agencies, the industry has now gotten to the point where three men make all the programming decisions for the three networks, and that reduces the opportunity.

SECOND INTERIM REPORT, PART II, *supra* note 1, at 550. Former Commissioner Johnson states:

> [T]he supreme goal has become ratings, cost per thousand, and advertising revenue. This single-minded drive for profits has quite naturally produced many of the motivations for content control that follow. Centralized network control over programming, seeking profit

sulting in greater emphasis on these commercial factors by the networks and mass advertisers; (3) the switch to filmed program series; and (4) the emergence of ABC as a viable network with its emphasis on "counterprogramming" emphasizing action-adventure programming.[121]

Testimony of several producers indicated that programs offered by independent producers which would have added diversity and balance, and which had been accepted by advertisers, were subsequently rejected by networks because they were not designed to attract the maximum circulation.[122] The staff concluded that lack of diversity on television was not required by the economics of the industry[123] since, in addition to audience size, advertisers are concerned with other factors such as audience impact[124] and selectivity.[125] Thus, it noted that the "target audience" sought to be reached differs from advertiser to advertiser; as a result, there is a "potential decisional range of wide scope and breadth in the choice of 'markets' and hence 'audiences' which the sum total of network television advertisers seek to reach."[126]

The staff found that, although there is an obvious need for the "formula" mass circulation series, the networks had failed to meet

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> maximization, produces uniformity and blandness just as certainly as all meat, run through the same grinder, inevitably emerges hamburger.

Johnson, *supra* note 77, at 359.

[121] Second Interim Report, Part II, *supra* note 1, at 535, 308-12. It is somewhat ironic that the staff cites ABC's use of counterprogramming as a factor which contributed to the decrease of diversity of network television in view of the fact that, by definition, counterprogramming is an effort to compete with existing network offerings by exhibiting *different* types of programming. Thus the staff noted that "[i]n ABC's 'continuing use of counter-programming' it examines schedules of all three networks to seek to determine what 'is needed to provide a diverse schedule.'" *Id.* at 308.

[122] *Id.* at 534; Second Interim Report, Part I, *supra* note 1, at 86, 98. In the First Interim Report, the staff noted that a

> network must be constantly conscious of its 'circulation' position vis-a-vis its competitors. A show which is satisfactory to the advertiser for any or all of the reasons outlined above [sponsor identification, compatibility of the program and the product, cost-per-thousand circulation] may be unsatisfactory from the network's point of view because it does not produce a sufficiently large audience or does not provide, in the network's judgment, the best kind of program for the time slot involved, or for a variety of other reasons.

Interim Report, *supra* note 1, at 327 (footnote omitted).

[123] Second Interim Report, Part II, *supra* note 1, at 200.

[124] *Audience impact* was defined as "the degree to which an advertising message penetrates the public consciousness." *Id.* at 34.

[125] *Audience selectivity* was defined as "suiting the audience for the advertising message to the market for the product." *Id.*

[126] *Id.* at 369-70. *See* Second Interim Report, Part I, *supra* note 1, at 101. All three networks agreed with the staff's conclusion that not all advertisers are interested in maximum audiences. Second Interim Report, Part II, *supra* note 1, at 239 (CBS); *id.* at 253 (NBC); *id.* at 370-71 (ABC).

the needs of a large portion of the viewing audience, consisting of the "better educated, higher income population," which, according to the staff, constitutes a " 'rich market' for network advertisers."[127] Finally, the staff concluded that, in any event, programming decisions based solely on maximization of audience size was unacceptable:

> Any notion that the raw materials required for our intellectual, spiritual, and political development should be circumscribed, wholly or partly, by a supposed mean average of the tastes and attitudes of 'the majority' at a given time, as indicated by 'scientific' head counts or the 'educated guesswork' of advertising 'experts,' is contrary to the essential purpose of cultural democracy.[128]

THE NETWORK PROGRAM PROCUREMENT RULES

The Proposed Network Rules

In its Second Interim Report the staff concluded that the Chain Broadcasting Rules adopted in 1941 had failed to reduce network dominance[129] and recommended that further efforts be made to change the structure of network television to increase competition in the program procurement process.[130] Specifically, the staff recommended that the Commission consider adopting rules which would: (1) prohibit network restraint of competition among sources of programming or among local television stations; (2) limit the number of hours per week which a network could devote to programs in which it had acquired the first-run license; and (3) prohibit networks from engaging in domestic syndication and from acquiring subsidiary rights in programs they exhibit.[131]

Largely in response to the network study reports, the Commission proposed to adopt rules regulating the program procurement process.[132] The proposed rules were addressed to the three basic areas of regulatory concern resulting from the programming inquiries: network involvement in syndication, network acquisition of financial interests in producer-licensed programming, and the monopolization of prime-time viewing hours by programs in which the networks have a financial interest.

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[127] SECOND INTERIM REPORT, PART II, *supra* note 1, at 34-35. *See* PTAR I, *supra* note 41, at 391.

[128] SECOND INTERIM REPORT, PART I, *supra* note 1, at 28-29. The staff also noted that the local station licensee is virtually helpless to correct the lack of diversity and other programming deficiencies resulting from network programming due to the high cost of comparable programming and that "the composition of the network schedule . . . becomes a highly limiting factor in the licensee's ability to serve his community." SECOND INTERIM REPORT, PART II, *supra* note 1, at 199. *See* SECOND INTERIM REPORT, PART I, *supra* note 1, at 59.

[129] SECOND INTERIM REPORT, PART I, *supra* note 1, at 100. Schwartz notes that "the chain broadcasting regulations proved ineffective to curb the networks because the FCC seriously underestimated both the economic power of the networks and the practical realities of broadcasting." Schwartz, *supra* note 54, at 785.

[130] SECOND INTERIM REPORT, PART I, *supra* note 1, at 100-01.

[131] *Id.* at 114-16.

[132] Proposed Rulemaking, note 8 *supra*.

Under the proposed rules, networks[133] would be prohibited from: (1) engaging in any domestic syndication; (2) engaging in foreign syndication of independently produced programs; and (3) acquiring any financial interests in programs, or in their distribution, which were produced wholly or in part by independent producers with the exception of the exclusive right to network exhibition.[134] With respect to the alleged network monopoly of prime time, the Commission sought a return to advertiser-licensed network programming by proposing a rule which would prohibit the networks from offering a prime-time network schedule in which more than fifty percent of the programming, or fourteen hours a week, whichever was greater, consisted of progamming in which the networks had any financial interest including the first-run license.[135] According to the Commission, the proposed rule was intended to "provide opportunity for entry of more competitive elements into the market for television programs for network exhibition, and . . . to encourage the growth of alternate sources of television programs for both network and non-network exhibition."[136]

The Commission pointed out that, under the proposed "50-50 rule," the market for the "sale" of network programming would be expanded to again include advertisers, thereby greatly enhancing the ability of independent producers to compete for access to network time.[137] According to the Commission, direct sales to advertisers would benefit the public interest in two important ways. First, it would facilitate diversity in network programming since the number of entities making programming decisions would equal the three national networks plus all of the advertisers purchasing programs directly from producers.[138] Second, direct sales would enhance the financial stability of independent producers since advertisers who purchase programs from the producer rarely seek to acquire any of the subsequent rights in the programs, and thus the producer would be able to retain these important financial interests.[139]

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[133] The proposed rules would apply to "network television licensees," a term obviously intended to describe the three national networks in their capacity as broadcast licensees (each network owns five VHF television stations) in order to avoid a perceived lack of statutory authority to regulate networks directly. A *network television licensee* was defined as "a television station . . . which engages in chain broadcasting," and *chain broadcasting* was defined as the "furnishing of programs to a substantial number of television broadcast stations on a daily basis for a substantial number of hours per day." *Id.* at 2164 (§ 73.659(a)).

[134] Under the proposed rules the networks would also be required to divest themselves of any such interests. *Id.* § 73.659(b)(3).

[135] The proposed rules also made it clear that the rules would not apply to situations where advertisers acquire the network exhibition rights from a producer and subsequently purchase time from a network for its exhibition. The proposed rule provided that "nothing herein shall prohibit a network television licensee from agreeing with another person or persons as part of a contract or arrangement for network time and facilities that the particular program or series involved will be broadcast exclusively on the network during the term of such contract . . . ." However, such exclusivity agreements could not exceed a term of one year. *Id.* (§ 73.659(d)).

[136] *Id.* at 2147. The Commission also noted that the proposed rule would create new program sources for additional UHF television stations which might form the base for a fourth network. *Id.* at 2158.

The proposed rule would also have exempted several categories of programs from the fifty percent requirement. These included newscasts, news interviews, special news programs, on-the-spot coverage of news events, and sustaining programs.[140] Such programming was exempted because the Commission found that it involved the networks' "journalistic and editorial responsibility."[141] The Commission also raised the question of whether public affairs documentaries should be exempted because of their close relationship to the network news function. On one hand, it noted that the networks supervise and control such programs carefully and that the presentation of public affairs programming should be encouarged. On the other hand, the Commission noted that there were other producers capable of producing documentaries who would add new viewpoints to such programming.[142] The Commission took no initial position on this issue, merely requesting comments on whether such programming should be exempted and whether the "network policy of exclusive production of public affairs documentaries [was] in the public interest."[143]

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[137] *Id.* at 2160.

[138] *Id.* at 2148, 2150.

[139] *Id.* at 2150. As previously noted, the Commission took the position that these subsequent rights were critical to the economic vitality of program producers since producers seldom recover their initial production costs from the network run and thus rely on domestic and foreign syndication for their profits. *See* text accompanying note 87 *supra*.

[140] Sustaining programs are programs broadcast without sponsorship. SECOND INTERIM REPORT, PART II, *supra* note 1, at 229-30.

[141] Proposed Rulemaking, *supra* note 8, at 2161.

[142] *Id.*

[143] *Id.* The staff had previously concluded that there was no valid reason for precluding independent producers from obtaining network exhibition of such programming, noting that "[s]uch a monopoly shackles the potential effectiveness of our most powerful and pervasive means of disseminating information to the public." SECOND INTERIM REPORT, PART II, *supra* note 1, at 18.

The 1970 Network Rules

Five years later, the Commission adopted a modified version of the rules it had proposed in 1965.[144] The network financial interest and syndication rules were adopted virtually as proposed.[145] However, the fifty percent rule was substantially modified. During the period provided for comment, Westinghouse Broadcasting Company submitted a counterproposal known as the "prime-time access rule," which would prohibit network affiliates in the top fifty markets in which there are three or more operating television stations from broadcasting regularly scheduled network programs for more than a total of three hours during the four-hour[146] prime-time period.[147] In announcing its decision to adopt the Westinghouse proposal, the Commission stated that it did not consider the proposed rule unworkable and that, in its view, it would have achieved the desired results without any negative side effects. However, it preferred the Westinghouse proposal because it was concerned that the proposed rule might adversely affect ABC's ability to compete successfully with the other two networks,[148] and because it felt that the Westinghouse proposal was more direct in providing non-network markets for independent producers.[149]

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[144] PTAR I, note 41 *supra*. For an overview of the FCC proceedings, see Bryant, note 4 *supra*.

[145] PTAR I, *supra* note 41, at 398-99. The only change was the deletion of that part of the financial interest rule which would have required networks to divest themselves of interests in programs they presently held. By adoption of the syndication rule, which prohibits networks from engaging in domestic syndication, the networks were forced to divest themselves of their syndication divisions.

[146] *Prime-time* was defined as "the hours [between] 7 p.m. and 11 p.m. local time, except that in the central time zone the relevant period shall be between the hours of 6 p.m. and 10 p.m." 47 C.F.R. § 73.658(k) (1970).

[147] 33 Fed. Reg. 14470, 14471 (1968). A similar proposal was rejected by the FCC when it eliminated option time in 1963. Option Time and the Station's Right to Reject Network Programs, Second Report and Order, 34 F.C.C. 1103, 1130 (1963). *See* note 54 *supra*. The Commission noted that at that time "[w]e wished to see whether elimination of option time would correct the competitive imbalance between networks and their affiliates and increase diversity of program source." PTAR I, *supra* note 41, at 384 n.7. The proposal was originally rejected as anticompetitive, at which time the FCC noted that "freedom of choice [of] the licensee should be preserved against derogation by artificial restraints, as long as no public benefit flows therefrom." 34 F.C.C. at 1128. The Commission also noted that, "if it appears [that the public interest would be served by action along some of these lines], of course such action will be considered." *Id.* at 1131. In the program procurement proceeding, the Commission concluded that "[t]he record herein demonstrates that our elimination of option time has not operated to make more time available to nonnetwork programs and to multiply competitive program sources." PTAR I, *supra* note 41, at 396.

[148] PTAR I, *supra* note 41, at 384 & n.6. Commissioner Robinson, in his dissent to PTAR III, maintained that the Commission rejected the 50-50 proposal "essentially because of ABC's objection that it would be unfairly disadvantaged by a system of independent program brokers." PTAR III, *supra* note 6, at 889 (Robinson, Comm'r, dissenting). ABC maintained in its comments that it would be weakened competitively if it were precluded from filling its sched-

The rule, as adopted, does not apply to noncommercial stations and contains specific exemptions for "special news programs dealing with fast breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office."[150] The rule also prohibits affiliated stations in the top fifty markets from filling the newly created "access time" with off-network programs or with feature films which have previously been shown in the same market.[151]

The Commission stated that the prime-time access rule was not intended to limit network programming to three hours per day but only to limit the amount of network programming any station in the top fifty markets could offer during prime time. The Commission further expressed the desire that the networks consider the feasibility of continuing to offer a longer schedule in view of the increased

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ule with programs procured directly from producers because it was the weakest of the three national networks, lacking comparable facilities and having fewer affiliates. Congressman Celler attributed ABC's comparative weakness to three factors: (1) it was the last of the three networks to be organized; (2) when CBS and NBC radio affiliates acquired television stations, they acquired VHF stations and became television affiliates of the networks with whom they had previously had radio affiliations; and (3) as a result, ABC had to obtain its market coverage by using UHF stations in intermixed markets to a far greater degree than either CBS or NBC. Celler, *supra* note 10, at 559 n.35. Barrow notes that the FCC approved the ABC-United Paramount Theaters merger to enable ABC to acquire sufficient working capital to "develop a competitive network." Barrow, *supra* note 54, at 287. For a discussion of ABC's competitive position in network television, see the FCC proceeding on the ABC-ITT proposed merger, Applications by American Broadcasting Co., 7 F.C.C.2d 245 (1966) and the discussion in Levin, *Broadcast Structure, Technology, and the ABC-ITT Merger Decision*, 34 LAW & CONTEMP. PROB. 452, 479-82 (1969). *See also* SECOND INTERIM REPORT, PART I, *supra* note 1, at 57.

[149] PTAR I, *supra* note 41, at 384. The Commission stated that it would hold the proposed rule in abeyance while it evaluated the effectiveness of the Westinghouse proposal. *Id.*

[150] *Id.* at 385. The Commission noted that although it was not exempting live sports programs, it would consider waiver requests for such sports events which normally conclude before the beginning of prime time but continued longer than anticipated into prime time, or for sports events beginning within the 7-11 p.m. period which continue beyond the three-hour limit. *Id.* at 395 n.35. The Commission also stated that a waiver would be granted where a network affiliate presents one hour of local news from 6-7 p.m. which is followed by network news at 7 p.m., noting that the same result could be achieved by merely interspersing the network news at 6:30 p.m., proceeded and followed by one-half hour of local news. *Id.* at 395 n.36.

[151] *Id.* at 395. The Commission stated that if stations were permitted to exhibit movies during the newly created access period, the purposes of the rule would be frustrated. *Id.* The feature film restriction was subsequently modified to prohibit the exhibition of feature films which had previously been exhibited in a station's market within the previous two years. *See* note 172 *infra*.

availability of commercial UHF stations in the top fifty markets.[152] However, the Commission found that, even if the networks reduced their evening programming from three and one-half to three hours,[153] network affiliates in markets below the top fifty would not be substantially affected since they would be free to utilize off-network programs and feature films previously exhibited in the market during the newly created "access time."[154] With respect to the argument that these stations would suffer economically as the result of reduced advertising support, the Commission simply stated that the benefits of the rule had not been offset by a reasonable demonstration of detriment to the small market stations.[155]

In its Report and Order, the Commission indicated that the facts favoring adoption of the proposed rules were compelling. It found that high-cost, prime-time, first-run, syndicated programming—the major competition for network programs—had almost completely disappeared; that the networks controlled the network program production process "from idea through exhibition;" and that, due to the dramatic increase in the use of off-network programming, the networks also controlled "the production and hence, the form and content, of a large share of the syndicated programs exhibited by television stations."[156] The Commission noted that the prime-time access rule was designed to further the public interest by alleviating this dominance and by providing an impetus to the regeneration of a viable syndication industry composed of independent producers capable of producing high quality prime-time programming.[157]

As was originally proposed in 1965, the new rules prohibited networks from engaging in program distribution except for foreign distribution of network produced programming. While the Commission's explanation for this distinction is somewhat unclear,[158] it undoubtedly rested on its determination that, in the domestic syndication market, networks have an unfair competitive advantage over independent syndicators due to their pre-existing relationship with the affiliated stations.[159] The new rules also prohibited networks from acquiring either foreign or domestic profit shares from producers. The Commission noted that unless networks were precluded from acquiring foreign as well as domestic profit shares, these rights would continue to be a significant factor in network program selection and would diminish an important source of revenue available to independent producers.[160]

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[152] PTAR I, *supra* note 41, at 395. At the time the rule was adopted, 34 of the top 50 markets had one or more independent stations. *See* BROADCASTING Y.B. 23-53 (1970).

[153] Prior to the adoption of the prime-time access rule, the three networks offered only three and one-half hours of network programming during the four hour prime-time period. PTAR I, *supra* note 41, at 395.

[154] *Id.* at 396 n.38.

[155] *Id.*

[156] *Id.* at 389.

[157] *Id.* at 395, 397. The Commission also noted that the rule was further designed to facilitate the development of new program sources so that local stations would have more than a nominal choice of prime-time programming. It pointed out that increased program sources would also benefit the development of UHF and might facilitate the presentation of local programming during access time. *Id.* at 394, 395 n.37, 397.

[158] The Commission merely stated that foreign distribution of network produced program-

Two Commissioners, Burch and Wells, dissented from the adoption of the three network rules. Writing for the dissenters, Chairman Burch directed his comments to the newly adopted prime-time access rule, challenging the Commission's assumption that merely creating one hour of "access time" in the top fifty markets would stimulate the independent production of new quality programming profitable to both the syndicator and the stations.[161] This assumption was erroneous, according to Burch, because, unlike the networks, the producer will have no assurance that his programs will be purchased by a sufficient number of stations in the top fifty markets: "Even if the program is selected under existing economies and tax structures, it is quite clear that very great amounts of capital will be required to produce programming, ... The fractionated top 50 market is simply not sufficient to sustain the expensive programming effort here required."[162] Thus, Burch expressed the belief that the rule will never achieve its intended purpose—the reestablishment of a viable independent television program production market. Burch was also less than optimistic about the Commission's reliance on the prime-time access rule to increase program diversity. He predicted, with a notable degree of prescience, that the rule would simply lead to the production of more of the same, *i.e.*, "more games, more light

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ming differed from domestic distribution of such programming without indicating how it differed. *Id.* at 399.

[159] *Id.* at 398.

[160] *Id.* at 399. The Commission ordered that divestiture of the networks' syndication activities be accomplished by September 1, 1971, thus providing one year for an "orderly phase out," that networks terminate acquisition of domestic and foreign subsidiary rights by September 1, 1970, and that the prime-time access rule become effective on September 1, 1971 which, according to the Commission, provided "sufficient lead time to permit networks, program producers and stations to make the necessary arrangements and alterations in their operations." *Id.* The Commission also announced that it was not terminating the proceeding since it wished to "study the effect of [the] new rule in practical operation." *Id.* at 401.

[161] *Id.* at 413 (Burch, Chairman, dissenting).

[162] *Id.*

entertainment along proven formulas, [and] more 'emcee' talk shows."[163]

Finding that the Commission's action would provide no benefits, Burch then assessed the costs of the new rule. First, he noted that the rule will deprive viewers in the top fifty markets of a significant amount of prime-time, high quality network programming.[164] Second, he argued that there will be a similar, albeit more adverse, deprivation in the smaller markets. He pointed out that, although these markets are exempted from the rule, in effect they are not so exempted since the networks have already announced that they will not continue to provide programming for the smaller markets during the access period. Because these markets do not have the requisite advertising base, the stations therein will be unable to afford high cost, syndicated programming even if it were offered.[165] Third, the rule will have an adverse effect on the independent UHF stations, despite the majority's assumptions to the contrary, since such stations will now have to compete for non-network programming with the powerful VHF stations in the top fifty markets.[166] Finally, Burch assailed the Commission's refusal to exempt news interviews, news documentaries, and newscasts from the operation of the rule which he characterized as a subordination of news programming to entertainment programming.[167]

In closing, Chairman Burch noted that if the Commission wished to increase diversity of television programming, it must "encourage a different economic base for program presentation."[168] Under the existing broadcasting structure, where a station is limited to one channel, Burch observed that stations will continue to program for the mass audience. As an alternative to an unworkable rule creating an artificial access period, Burch suggested that the Commission focus on the obvious alternatives such as subscription television, cable television, and noncommercial educational television.[169]

In response to a number of petitions for reconsideration, the

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[163] *Id.*

[164] *Id.*

[165] *Id.* at 413-14.

[166] *Id.* at 414. He noted that, for this reason, the Association of UHF Broadcasters argued that the rule would damage UHF broadcasting. *Id.*

[167] *Id.*

[168] *Id.* at 416.

[169] *Id.* Chairman Burch also dissented to certain procedural aspects of the proceeding. *Id.* at 414-15.

Commission made several minor changes in the rules.[170] The term "network" in the prime-time access rule was redefined to make it clear that the rule applied only to the three major national networks;[171] the rule prohibiting stations in the top fifty markets from using off-network programs or feature films previously shown in the market during "access time" was clarified;[172] and the effective date of the rule prohibiting the use of off-network programs and certain feature films during access time was postponed for one year to give stations adequate time for the transition and to permit them to use the programs within this category which they had already acquired.[173]

The Commission also refused to reopen the proceeding to obtain more economic facts[174] and again rejected the argument that individual producers were economically incapable of competing with network-producer combinations, reiterating their position that the issue could not be resolved without actual competitive experience.[175] One petitioner argued that the new programs produced under the rule would not differ from those currently being produced in the first-run syndication market and would consist primarily of talk, interview, game, animal, and music shows.[176] However, the Commission concluded that normal competitive forces would result in the production of an adequate supply of programming for the access period.[177]

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[170] Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C.2d 318 (1970).

[171] *Id.* at 333.

[172] *Id.* at 333-34. First, the Commission amended the rule to make it clear that the feature film restriction did not include films previously exhibited in the market by way of a CATV distant signal. Next, the Commission limited the feature film restriction to films which have been exhibited on television stations in the market at any time during the previous two years. This was adopted in response to comments pointing out that it would be very difficult for an individual affiliate to ascertain whether or not a film had been previously exhibited on one of the other stations if there were no time limitation for such prior exhibition.

[173] *Id.* The Commission also refused to extend the exemptions to include news programs and news documentaries, noting that it would review the exemptions after the rule "has been in operation for a reasonable length of time." *Id.* at 334. In addition, the effective date of the prime-time access rule was changed from September 1, 1971 to October 1, 1971. *Id.* The Commission also refused to stay the effectiveness of the rules pending appeal. *Id.* at 335-36. However, on October 14, 1970, the Commission did stay, pending appeal, the effectiveness of the syndication rule insofar as it prohibited networks from acquiring domestic and foreign rights in transactions other than those arising out of their network program selection process. Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 26 F.C.C.2d 25 (1970).

[174] The Commission noted that it had relied heavily on the economic data which had been supplied by the networks and which supported most of the tentative conclusions set forth in its 1965 notice of proposed rulemaking. 25 F.C.C.2d at 321. For a discussion of the data relied upon the Commission, see note 213 *infra*.

[175] 25 F.C.C.2d at 324-25.

[176] *Id.* at 322.

Several petitioners again argued that the reduction in network programming resulting from the prime-time access rule would seriously harm small-market affiliates without any offsetting public benefit.[178] In balancing this potential adverse effect against the overall public interest, the Commission simply concluded that the probable effect on small-market stations would not outweigh the benefits from increased competition and diversity resulting from the rule.[179] The Commission also refused to extend the network syndication rule to prohibit networks from engaging in foreign distribution of network-produced programs.[180]

One petitioner argued that allowing networks to engage in this practice would perpetuate a conflict of interest since networks will tend to select these programs for network exhibition as opposed to independently produced programming in which they have no foreign distribution rights.[181] In refusing to adopt the suggested amendment, the Commission merely stated that it believed that the existing rule "will tend to improve the bargaining positions of producers with networks so as to bring about a desirable degree of expansion of stable and viable program sources" and that if it does not have this effect, the suggested amendment could then be considered.[182]

Subsequently, several parties filed petitions in the circuit court of appeals to review the three network rules, alleging that the rules violated the first amendment and exceeded the Commission's statutory authority.[183] Petitioners argued that the prime-time access rule restrained network speech by barring network programming from the top markets for one-half hour a day, that it restrained affiliates' speech by limiting their ability to choose network programming, and that it restrained the first amendment rights of viewers by preventing them from selecting network programming during the access period.[184]

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[177] *Id.* at 325.

[178] *Id.* at 327.

[179] *Id.* at 330. The Commission predicted that stations reporting revenues in excess of $1,000,000 for 1969 in the markets below the top 50 would sustain revenue losses of less than $20,000 as a result of the prime-time access rule while stations reporting revenues of less than $1,000,000 would sustain revenue losses of no more than $44,000. *Id.* at 328-29.

[180] In reiterating its decision to adopt the network syndication and financial interest rules, the Commission stated that the "principal purposes" of the two rules were twofold. First, the rules were designed to lessen the bargaining leverage provided by network control over program exhibition on most stations throughout the country. This leverage was thought to enable networks to bargain successfully for subsidiary rights and interests with producers. The second purpose was to remove the possibility that acquisition of such rights becomes a prerequisite to acceptance of a program for network exhibition. *Id.* at 331.

[181] *Id.* at 331-32.

[182] *Id.* at 332. Chairman Burch again dissented for the same reasons that led him to dissent from the original adoption of the rule, stressing the adverse effect on stations in the smaller markets and the adverse impact on the development of UHF. He concluded: "I thus believe the potential financial damage to this many stations far outweighs the tenuous hope of bolstering the independent syndication markets to which the majority clings in denying reconsideration." *Id.* at 338 (Burch, Chairman, dissenting).

The Court of Appeals for the Second Circuit rejected petitioners' first amendment arguments on two grounds. First, it noted that the Supreme Court had held that the permissible scope of governmental regulation was broader with respect to other media.[185] Second, the court concluded that the rule in question was designed to fulfill a fundamental precept of free speech—the encouragement of program diversity and the development of " 'diverse and antagonistic sources of program service.' "[186] The court also rejected the argument that the adoption of the prime-time access rule amounted to censorship, noting that the Commission had not prohibited or mandated what networks or licensees may or may not broadcast; it had only required that they afford others "the *opportunity* to broadcast."[187]

The court then found that the Commission had not exceeded its statutory authority by adopting the rules. With respect to the prime-time access rule, the court found that section 303(g) of the Communications Act, which directs the Commission to "generally encourage the larger and more effective use of radio in the public interest,"[188] provided ample authority for the adoption of the rule.[189] The court rejected the argument that the rule must be overturned because it could not succeed, finding that the Commission's determination that there was a sufficient probability of success to warrant adoption of the rule was based upon a substantial record and was not arbitrary:[190]

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[183] Mount Mansfield Television Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). In addition to *Mount Mansfield, Television Inc.*, CBS challenged the prime-time access and network financial interest rules, while NBC and ABC challenged only the network financial interest and syndication rules. *Id.* at 472 n.1.

[184] *Id.* at 476.

[185] Red Lion B'casting Co. v. FCC, 395 U.S. 367, 386-90 (1969). The court observed that the dual standard was justified because technological limitations prevented everyone from using the broadcast media and because of the "preferred position" conferred on existing licensees by the government. Mount Mansfield Television Inc. v. FCC, 442 F.2d at 477. The literature on this subject is extensive. *See, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

[186] 442 F.2d at 477.

[187] *Id.* at 480 (emphasis in original).

[188] 47 U.S.C. § 303(g) (1970).

[189] 442 F.2d at 479-80.

> The evidence in the record leads inescapably to the conclusion that access to network affiliated stations during prime time is virtually impossible for independent producers of syndicated programs. On the basis of this conclusion, the Commission's attempt to remedy the situation is far from arbitrary; it is directed in fact to the heart of the problem.[191]

With respect to the syndication and financial interest rules, the court held that the lack of express statutory authority to directly regulate network activity was not conclusive[192] and found that the networks were engaged in chain broadcasting[193] for the purpose of section 303(i) of the Communications Act which authorized the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting."[194]

The court also found that it was reasonable for the Commission to conclude that "the financial interest prohibition may well be a necessary tool to forward the development of the strong independent suppliers who will be needed in the newly created market if the aims of increased diversity and decreased network domination are to be accomplished."[195] Similarly, the court concluded that it could not find unreasonable the Commission's decision that the financial interest prohibition was necessary in order to "remove the incentive for networks to choose for exhibition only those shows in which these [syndication] rights are granted [and to] increase the profitability of independent productions."[196]

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[190] *Id.* at 483-84. The court also found that the off-network and feature film restrictions contained in the prime-time access rule were reasonable, thereby upholding the Commission's conclusion that the use of reruns and film during access time would frustrate the purpose of the rule which was to create a market for first-run syndicated programs. *Id.* at 484.

[191] *Id.* at 483.

[192] *Id.* at 480. The court relied heavily on the Supreme Court's decision in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), wherein the Supreme Court upheld FCC regulation of CATV despite the absence of specific statutory authority. In reaching its decision, the Court agreed with the Commission's conclusion that it was necessary to regulate CATV in order to develop "an appropriate system of local television broadcasting." *Id.* at 177.

[193] *Chain broadcasting* is defined in the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p) (1970). The Act defines *broadcasting* as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1970). The court found that "networks transmit their signals from a network owned station over leased connecting lines, [which] signals are then relayed to the public by other network owned stations and by affiliated licensees . . . ." 442 F.2d at 481.

[194] 47 U.S.C. § 303(i) (1970). The Act defines *radio communication* as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C. § 153(b) (1970). *See* 442 F.2d at 481. The court indicated that the Commission was specifically authorized by 47 U.S.C. § 313 (1970) to consider the problem of network dominance and empowered by 47 U.S.C. § 303(r) (1970) to adopt rules necessary to carry out the purposes of the Act. 442 F.2d at 481. However, the court apparently misread § 313, which only provides for license revocation should a licensee be found guilty of an antitrust law violation.

[195] 442 F.2d at 486.

With respect to the remaining aspects of the rule designed to decrease network dominance, the court noted that the Commission had not contended that networks presently dominate the syndication industry but only contended that network revenues from syndication are substantial and increasing. Nevertheless, according to the court, the fact that the rule is directed at potential as opposed to actual domination is a sufficient basis for regulatory authority.[197] Thus, the court concluded that "the syndication rule is supported by evidence and is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.' "[198]

ANALYSIS OF THE COMMISSION'S ASSUMPTIONS CONCERNING CONCENTRATION OF ECONOMIC CONTROL

Despite the Commission's assertion that "[p]articular attention has been paid to the economics of network television program procurement and production and their effect upon the public interest in television program service,"[199] little effort was made to undertake a meaningful economic analysis of this process. As Commissioner Hyde noted in 1965: "There is no dearth of assumptions, opinion and argument on the matter, but there is a paucity of definitive information, and no real analysis regarding the economic factors in present program practices."[200] The following analysis is an attempt to correct this omission and to provide a framework for more extensive economic analyses.[201]

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[196] *Id.*

[197] *Id.* at 486-87.

[198] *Id.* at 487. The court also held that the fact that small market licensees would initially suffer economic harm did not preclude the adoption of the prime-time access rule, *id.* at 488, and rejected several procedural arguments. *Id.* at 488-89. On June 7, 1972, the Commission set the effective dates of the network syndication and financial interest rules, which had been stayed pending appeal, as June 1, 1973 and August 1, 1972, respectively. Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order Setting Effective Dates, 35 F.C.C.2d 411 (1972).

[199] Proposed Rulemaking, *supra* note 8, at 2146.

[200] *Id.* at 2174.

[201] Although no comprehensive economic analysis of the Commission's 1970 rules has been undertaken, economists have dealt with various aspects of these rules. *See generally* R. NOLL, M. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973)

The adoption of the three network rules in 1970 was designed to correct the problems the Commission found to exist in the program procurement process. These problems, which included a significant reduction in the number of television program sources, a decline in television program diversity, and economic harm to independent producers, were attributed by the Commission to the concentration of economic and creative control.

In its attempt to analyze network dominance of the program procurement process, the Commission failed to define carefully the economic market or markets within which network economic power was to be measured. Thus, the Commission referred to network domination of programs for television,[202] for network television exhibition,[203] for nighttime television exhibition,[204] for evening television exhibition,[205] for prime-time exhibition,[206] for exhibition on affiliated stations,[207] for the independent station market,[208] and for the independent syndication market.[209] Not only did the Commission fail to define the relevant market, but it also made no effort to determine the relative market shares attributable to the competing entities—networks, producers, and advertisers.

It is clear from the Commission's analysis of network dominance that three markets must be considered. These include the general program exhibition market, consisting of all prime-time programming exhibited on stations in the top fifty markets;[210] the network exhibition market, consisting of prime-time network programming exhibited on affiliated stations in the top fifty markets; and the non-network exhibition market, consisting of non-network, prime-time programming exhibited on stations in the top fifty markets. The relevant market shares in each of these markets will be computed in order to test the Commission's conclusion that networks have achieved "virtual domination of television program mar-

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[hereinafter cited as R. NOLL], B. OWEN, J. BEEBE, & W. MANNING, TELEVISION ECONOMICS (1974) [hereinafter cited as B. OWEN], Crandall, *FCC Regulation, Monopsony, and Network Television Program Costs*, 3 BELL J. ECON. 483 (1972); Crandall, note 70 *supra*.

[202] Proposed Rulemaking, *supra* note 8, at 2147, 2157.

[203] *Id.* at 2147, 2152-54, 2156, 2158; PTAR I, *supra* note 41, at 386, 388-90.

[204] PTAR I, *supra* note 41, at 384, 385; Proposed Rulemaking, *supra* note 8, at 2156, 2157.

[205] PTAR I, *supra* note 41, at 389.

[206] *Id.* at 385, 394.

[207] *Id.* at 386, 394.

[208] *Id.* at 385, 386-87, 389.

[209] Proposed Rulemaking, *supra* note 8, at 2147, 2156.

[210] For a discussion of why the top 50 markets were chosen for the Commission's analysis, see note 44 *supra*. As was indicated earlier, this analysis will focus on prime-time entertainment programming exhibited on stations in the top 50 markets unless otherwise stated.

kets."[211]

The General Program Exhibition Market

The relative market shares of entities owning exhibition rights[212] to programming exhibited in 1958 and 1968 may be derived from the following data taken from the 1969 Little Report:[213]

TABLE I[214]

Average Weekly Hours of Prime-Time Entertainment Programming on Affiliated and Independent Stations by Production Type

1958

	Affiliated Stations	Independent Stations	Total	Percentage of Total Hours
First-Run Syndication	556	208	764	14.48
Off-Network	70	17	87	1.65
Movies	315	187	502	9.51
Local	520	175	695	13.17
Network	3229		3229	61.19
Total	4690	587	5277	100.00

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[211] Proposed Rulemaking, *supra* note 8, at 2147.

[212] *Economic control* is defined for purposes for this article's analysis as the ownership of a
program's exhibition right prior to its "sale" to local stations for exhibition. Thus, the adver-
tiser "economically controls" the advertiser-licensed, network program since it acquires the
first-run exhibition rights from the producer prior to the program's exhibition. Similarly, net-
works economically control producer-licensed and network-produced programming. The term
sale is used to denote either a licensing arrangement, as between producers and local stations
for first-run programming, or the contractual arrangement between networks and their affili-
ates whereby the network purchases local station time for a program's exhibition. The hours of
prime-time programming economically controlled by each entity was selected as a relative
measure of market position instead of total dollar sales because the Commission was almost
exclusively concerned with "access" to prime-time exhibition markets.

[213] The Commission relied almost exclusively upon the Arthur Little, Inc. Report for net-
work and industry data. This report was originally submitted to the Commission by the net-
works in 1966 and supplemented in 1969. However, on April 21, 1969, Westinghouse
Broadcasting Co. questioned the accuracy of data in the 1969 report. On September 15, 1969,
CBS and NBC notified the Commission that some of the data in the report was inaccurate and,
on January 2, 1970, they filed revisions of Tables 35, 37, 74, 75, and 77-98. PTAR I, *supra* note
41, at 382-83, 385 n.9. For a discussion of the inaccuracies contained in the 1969 Report, see *id.*
at 386 n.13. In the Commission's order denying reconsideration, it noted that "a large part of
the Commission's Report and Order, most particularly that part dealing with the syndication
market, relies very heavily on the data contained in the Little studies." Competition and Re-
sponsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25
F.C.C.2d 318, 321 (1970). [The revised tables will hereinafter be cited as 1969 LITTLE REPORT
(REV.)].

[214] The figures in Table I were taken from 1969 LITTLE REPORT (REV.), *supra* note 213, at 177-78 (Table 80), 196-97 (Table 89), 204-05 (Table 93).

	Affiliated Stations	*1968* Independent Stations	Total	Percentage of Total Hours
First-Run Syndication	227	384	611	9.18
Off-Network	263	496	759	11.40
Movies	354	340	694	10.42
Local	496	291	787	11.82
Network	3807		3807	57.18
Total	5147	1511	6658	100.00

In order to determine the relative market shares from this data, it is necessary to ascertain which entities economically controlled the various program types listed in Table 1.

First-Run Syndicated Programming—Since all first-run syndicated programming exhibited in 1958 and 1968 was produced and owned by independent producers, all hours devoted to such programming in the general exhibition market should be included within the producer's market share.[215]

Off-Network Programming—One of the most noticeable facts revealed by Table 1 is that, despite the Commission's conclusion that network dominance had grown significantly since 1958, the percentage of prime time occupied by network programming in the general market actually decreased from 61.19 percent in 1958 to 57.18 percent in 1968.[216] It is clear, however, that the Commission assumed that off-network programming was economically controlled by the networks,[217] and would, therefore, have included the hours devoted to such programming within the networks' market share.[218] While it may be argued that the networks exercise *creative* control over off-network programming,[219] with the exception of the small number of programs they originally produced themselves, there is no evidence to indicate that networks control such programming economically.

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[215] Most of the smaller producers, who did not maintain distribution facilities, contracted with the networks or independent syndicators to distribute their programs in the off-network syndication market.

[216] This decrease can largely be explained by the fact that the number of independent stations in the top 50 markets, which exhibited non-network programming, increased from 19 in 1958 to 45 in 1968. 1969 LITTLE REPORT (REV.), *supra* note 213, at 204-05 (Table 93).

[217] "[I]ndependent producers who attempt to sell their programs . . . through the domestic syndication market must compete with 'off-network' programs which are *owned or controlled by network corporations*." Proposed Rulemaking, *supra* note 8, at 2156-57 (emphasis supplied). *See also id.* at 2159; PTAR I, *supra* note 41, at 389.

[218] Under this assumption programming controlled by networks would have increased from 62.84% in 1958 to 68.58% in 1968. *See* Table 1 *supra*.

[219] Concentration of creative control is treated at text accompanying notes 295-305 *infra*.

Ownership of exhibition rights to the off-network programming broadcast on local stations in 1958 and 1968 cannot be determined directly since neither the Commission proceedings nor the Little Reports contain such information. However, if it is assumed that the off-network programming exhibited in 1968 was originally exhibited on a network between 1962 and 1966,[220] and that 1968 off-network programming was made up of the same proportion of producer-licensed, advertiser-licensed and network-produced programs as the network programming exhibited between 1962 and 1966, an acceptable approximation of such ownership rights can be made.[221]

Table 2 sets forth the percentage of network programming which was producer-licensed, advertiser-licensed, or network-produced during the relevant periods.

TABLE 2

Percentage of Network Prime-Time Entertainment Programming by Licensing Arrangement: 1962-1966

	1957[222]	1962*-66[223]
Network-Produced	24%	8%
Advertiser-Produced	36%	7%
Producer-Licensed	40%	85%
Total	100%	100%

Thus it may be assumed that 8 percent of all off-network programming exhibited in 1968 was originally network-produced, that 7 percent was originally advertiser-licensed, and that 85 percent was originally producer-licensed.[224] Since information is available concerning the ownership of subsequent rights within the three production types, it is now possible to ascertain which entities economically controlled the off-network programming exhibited in 1958 and 1968.

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[220] Network programs were not released for off-network syndication until at least two years after the network series was initiated since it requires a minimum of two years to accumulate enough different episodes to make off-network syndication profitable. R. NOLL, *supra* note 201, at 76. A five-year sample was chosen because off-network programming was often more than two years old in view of the fact that, under the terms of the producer-network contract, a series could not be released for domestic off-network syndication until the completion of its network run. A. PEARCE, *supra* note 85, at 115; PTAR I, *supra* note 41, at 398-99.

[221] Since no data are available prior to 1957, it will be assumed that the 1957 network exhibition data is representative of the period between 1952 and 1956.

[222] 1969 LITTLE REPORT, *supra* note 50, at 5-8 (Table 2). In this report, 0.7% of network programming was attributed to combination ventures between advertisers and producers. This has been included in the producer-licensed category since there is no indication that advertisers retained any ownership interests in the resultant off-network programming.

[223] *Id.* The 1.7% attributed to combinations during this period was included in the producer-licensed category. *See* note 222 *supra*.

[224] Similarly, it is assumed that 24% of off-network programming exhibited in 1958 was originally network-produced, that 36% was advertiser-licensed, and that 40% was producer-licensed.

Producer-Licensed Programs.—The Commission's conclusion that producer-licensed off-network programming was economically controlled by the networks was based on the assumption that, by acquiring syndication profit shares and distribution rights in such programs, the networks thereby acquired economic control over them. Even assuming this to be an adequate measure of economic control, there were a substantial number of hours of producer-licensed programming in which networks acquired no subsequent interests at all. Although the percentage of such programming is not provided by the Commission and cannot be inferred from the data cited by it, data in the 1969 Little Report indicate that, between 1962 and 1966, networks acquired subsequent rights in only 69.4 percent of the programs they licensed from producers.[225] Since networks acquired no subsequent rights in the remaining 30.6 percent of such programming, these off-network hours must be included in the producer's 1968 market share.[226]

With respect to the remaining producer-licensed programs in which the networks did acquire subsequent rights, a close analysis demonstrates that, by acquisition of such rights, the networks did not thereby obtain economic control over such programming. The fact that networks acquired some degree of participation in the expected profits from future syndication of network programs does not necessarily mean that they thereby acquired economic control over such programming. This is especially true when the size of the profit shares acquired by the networks is considered. The Commission chose to ignore those data, merely noting in one instance that the networks "usually" acquired the rights to 50 percent of the profits from domestic distribution[227] and noting in another instance that producers were required to transfer "a substantial part of the potential profitability of their products" to the networks.[228] These estimates, however, were not accurate. Data in the 1969 Little Report indicate that, during the five-year period between 1962 and 1966, the average domestic profit share acquired by the networks was only

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[225] 1969 LITTLE REPORT, *supra* note 50, at 57 (Table 26).

[226] In 1957, networks acquired subsequent rights in only 58.4% of producer-licensed programming. *Id.* Therefore, the remaining 41.6% of these hours must be included in the producers' 1958 share.

[227] Proposed Rulemaking, *supra* note 8, at 2151.

[228] PTAR I, *supra* note 41, at 388-89. *See also* Proposed Rulemaking, *supra* note 8, at 2156.

23.95 percent.[229] Thus, the profit shares actually acquired by the networks were in fact relatively small and their acquisition does not support the conclusion that networks obtained economic control over the "sale" of such programs in the off-network market.[230]

In view of the fact that neither the acquisition of minority profit shares nor the acquisition of off-network distribution rights conferred economic control over such producer-licensed off-network programs, *all* of the hours devoted to such programming in which the networks merely acquired subsequent rights in 1968 should also be included in the producers' market share.

Advertiser-Licensed Programs.—In view of the fact that the Commission found that advertisers rarely acquired subsequent rights in programs they licensed from producers, it will be assumed the producers retained all of the syndication rights to these programs.[231] Thus, all of the advertiser-licensed, off-network hours should be included in the producers' market share.

Network-Produced Programs.—Since there is no reason to believe that networks conveyed any subsequent interests in network-produced programming to others, all of the hours devoted to such programming will be allocated to the networks' market share.

Network Programming.—In view of the fact that networks obtained the network exhibition rights to all producer-licensed programming, these hours must be included in the networks' market share along with all of the hours of network programming which were produced solely by the networks.[232] However, the hours of network programming consisting of advertiser-licensed programming cannot be included in the networks' share since advertisers, not the networks, acquired the network exhibition rights from producers to such programming and merely purchased time from the networks for exhibition of these programs.[233]

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[229] 1969 LITTLE REPORT, *supra* note 50, at 56 (Table 25).

[230] *See* Crandall, *supra* note 70, at 399. Similarly, the fact that networks acquired distribution rights to 23.7% of producer-licensed programming between 1962 and 1966 [derived from 1969 LITTLE REPORT, *supra* note 50, at 52 (Table 21)] does not mean that they thereby acquired economic control over these programs. It simply means that the networks obtained the right to distribute the programs to local stations and to receive an agreed-upon distribution fee for doing so.

[231] Proposed Rulemaking, *supra* note 8, at 2150. *See* Crandall, *supra* note 70, at 387-88. Data concerning the acquisition of subsequent rights by advertisers are not available. It is also assumed that producers retained all subsequent rights in programs produced in combination with advertisers. *See* note 222 *supra*.

[232] In 1958, 45.5% of the hours devoted to network programming were producer-licensed while 23.1% of such hours were produced by the networks. 1969 LITTLE REPORT, *supra* note 50, at 5-8 (Table 2). In 1968, 92.1% of such hours were producer-licensed and 4.1% network-produced. PTAR I, *supra* note 41, at 390.

Movies—In its discussion of the relative economic positions of networks and producers, the Commission ignored the fact that most of the movies exhibited on local stations were originally produced by independent television program producers. Although there are no data available indicating which entities owned the exhibition rights to movies exhibited on local stations in 1958 or 1968, it has been suggested that all[234] or at least 80 percent[235] of the movies produced in the United States were produced by the major independent television producers.[236] For purposes of this analysis, it will be assumed that 80 percent of the movies exhibited on television in 1958 and 1968 were produced by the major independent television producers, and that 80 percent of the hours devoted to movies on local stations in 1958 and 1968 should be included in the producers' market share. The remaining 20 percent will be allocated to non-television movie producers.

Local Programming—In the absence of any information concerning the ownership of local programs, all such programming will be allocated to the general category denoted "local producers."

As a result of the above analysis, the relative market shares of each entity owning exhibition rights to programs exhibited on stations in the top fifty markets between 6 and 11 p.m. can be determined and are set forth in Table 3:

TABLE 3

Market Shares in the General Program Exhibition Market

	1958	1968	Change
Networks	42.8%	55.9%	+13.1%
Producers	23.3%	28.1%	+ 4.8%
Advertisers	18.8%	2.1%	−16.7%
Local Producers	13.2%	11.8%	− 1.4%
Non-Television and Movie Producers	1.9%	2.1%	
Total	100%	100%	0%

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[233] In 1958, 30.7% of the hours devoted to network programming were advertiser-licensed. 1969 LITTLE REPORT, *supra* note 50, at 5-8 (Table 2). In 1968, only 3.8% of such programming was advertiser-licensed. PTAR I, *supra* note 41, at 390.

[234] Crandall characterizes movie producers as merely a "subset" of producers of television programming. Crandall, *supra* note 70, at 399-400 n.36.

[235] A. PEARCE, *supra* note 85, at 89.

[236] *See* note 85 *supra* for a list of these entities.

While these market shares reveal that the general program exhibition market is somewhat concentrated, they do not support the Commission's conclusion that the networks "control the entire network television program production process . . . ,"[237] that "[o]nly three organizations control access to the crucial prime-time evening television schedule,"[238] or that "network corporations . . . have progressively achieved virtual domination of television program markets."[239]

The Non-Network Program Exhibition Market

According to the Commission, a viable supply of first-run syndicated programming was important in order to provide an alternative to network programming and to ensure the economic well-being of independent producers.[240] However, it concluded that first-run syndicated programming had "virtually disappeared" as a result of network dominance of the general exhibition market and network economic control of off-network programming.[241]

The first problem with the Commission's analysis of this market is the fact that first-run syndicated programming had not "virtually disappeared" in 1968. In support of its conclusion that such programming had disappeared the Commission cited data in the Little Report which indicated that the number of half-hours during sample weeks devoted to first-run syndicated entertainment programs "on all stations in the top 50 markets" decreased from 1,065 in 1958 to

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[237] PTAR I, *supra* note 41, at 389.

[238] *Id.* at 394.

[239] Proposed Rulemaking, *supra* note 8, at 2147. This general exhibition market would be described by economists as falling just within the "highly concentrated" category in view of the fact that the four largest firms (the three networks and the individual independent producer with the largest market share) accounted for 58% of the prime-time hours exhibited on stations in the top 50 markets in 1968. According to Bain, highly concentrated industries include those in which "51 to 75% of industry shipments were supplied by the largest 4 firms." J. BAIN, INDUSTRIAL ORGANIZATION 134 (2d ed. 1968). Although an industry with a concentration level of 58% is characterized as highly concentrated, it is interesting to note that in 1963 8% of the 417 manufacturing industries analyzed by Bain were industries in which the four largest firms supplied 76 to 100% of industry shipments. *Id.* It is also interesting to note that in 1972 many industries had significantly higher concentration levels than the television program exhibition market. These included cigarettes (84%), greeting card publishing (70%), explosives (67%), flat glass (92%), primary lead (93%), electric lamps (90%), and motor vehicles and car bodies (93%). U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 737-40 (Table No. 1262) (1975). It may be argued that concentration levels in the communications media deserve more regulatory concern since first amendment values are involved. *See* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 121 (1975). *See also* text accompanying notes 295-305 *infra*.

[240] PTAR I, *supra* note 41, at 394; Proposed Rulemaking, *supra* note 8, at 2159.

[241] Proposed Rulemaking, *supra* note 8, at 2156. *See also* PTAR I, *supra* note 41, at 385.

833 in 1968.[242] This analysis, however, was seriously biased against first-run syndicated programming. First, the data cited by the Commission (set forth above) were based on the 7-11 p.m. time period, even though all other comparisons had been based on the 6-11 p.m. period. Selection of the 7-11 p.m. period to test the viability of first-run syndication is biased because it omitted the hour when first-run syndicated programming is most likely to occur on affiliated stations. Thus, in 1968, 53 percent of all prime-time hours devoted to first-run syndicated programming on such stations was exhibited between 6 and 7 p.m.[243] Further, the data cited by the Commission did not consist of the total number of half-hours devoted to first-run syndicated programming on *all* stations in the top fifty markets but contained only the amount of such programming broadcast on a 1968 sample of such stations which excluded twenty-seven independent stations.[244] Since independent stations exhibited an average of 8.54 hours a week of first-run syndicated programming in 1968, while affiliated stations exhibited an average of only 1.55 hours a week of such programming,[245] the data employed by the Commission was seriously skewed against first-run syndication. However, even if it is assumed that the stations which were omitted from the samples broadcast the same amount of prime-time, first-run syndicated programming as those which were included, there still was, in fact, almost no change in the total hours devoted to first-run syndication between 1958 and 1968.[246]

Up to this point, this discussion has focused on an absolute measure of first-run syndication in order to test the Commission's conclusion that such programming had virtually disappeared in 1968. It must be noted that a relative comparison of first-run syndicated programming with other programming types competing for access to local station time indicates that the share of prime-time occupied by first-run syndication did decline from 14.92 percent in 1958 to 11.08 percent in 1968.[247] Even with such a relative comparison, however, it is difficult to support the Commission's conclusion that a program type occupying 11 percent of all prime-time programming has "virtually disappeared."

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[242] PTAR I, *supra* note 41, at 385.

[243] 1969 LITTLE REPORT (REV.), *supra* note 213, at 197-98 (Table 89).

[244] The 1968 sample also omitted two affiliated stations. The 1958 sample omitted eight affiliated and five independent stations. *See* 1969 LITTLE REPORT, *supra* note 50, at 142 (Table 56); 1969 LITTLE REPORT (REV.), *supra* note 213, at 197-98 (Table 89). Stations used in the sample were those included in American Research Bureau's "Sweep Survey of Television Stations." The stations omitted were those having less than a specified "estimated audience level." The exact criteria for selection of the sample are set forth in 1969 LITTLE REPORT, *supra* note 50, at F-1 to F-4 (Appendix F).

[245] 1969 LITTLE REPORT (REV.), *supra* note 213, at 190-91 (Table 86), 198-99 (Table 90). In 1968, 63% of the prime-time hours devoted to first-run syndication programming were exhibited on independent stations. *See* Table 1 *supra*.

[246] If all stations are included under the assumption stated in the text, the total hours devoted to first-run syndicated programming decreased from 852 in 1958 to 846 in 1968. The assumption that the omitted stations broadcast the same amount of first-run syndicated programming as those which were included in the sample is probably somewhat skewed in favor of first-run syndicated programming since the omitted stations were the smaller stations in these markets and probably devoted a somewhat smaller portion of their time to first-run syndication.

The second problem with the Commission's analysis of the non-network exhibition market was its conclusion that the significant increase in the number of hours devoted to off-network programming in this market came at the economic expense of independent producers. The Commission's conclusion that producers have not been able to compete successfully in the non-network exhibition market was based on the erroneous assumption that networks economically controlled the off-network programming which was being exhibited in competition with producers' first-run syndicated programming. In view of the preceding analysis which demonstrated that producers, not networks, economically controlled off-network programming,[248] this conclusion makes no sense. An examination of market shares in the non-network program exhibition market should dispel any concern that producers have been unable to compete effectively in this market.

TABLE 4

Market Shares of Entities Competing in the Non-Network Exhibition Market[249]

	1958 Share	1968 Share
Independent Producers	60%	65%
Local Producers	34%	28%
Non-Television Movie Producers	5%	5%
Networks	1%	2%
Total	100%	100%

The Commission's conclusion that network dominance of prime-time programming on affiliated stations impeded the ability of producers to gain access to time on these stations for first-run syndicated and off-network programming was correct in view of the fact that the number of prime-time hours devoted to network programs decreases the number of prime-time hours available for non-network programming. However, the Commission's assumption that network control over access to affiliated stations had resulted in a contraction in the size of the non-network program market from 1958 to 1968 is incorrect. Although there was a 13 percent increase in the hours of prime-time programming offered by networks to their affiliates during this period,[250] the percentage of prime-time hours devoted to network programming on stations in the top fifty markets actually declined, from 59.9 percent in 1958 to 50.5 percent in 1968.[251]

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[247] These figures are derived from 1969 LITTLE REPORT, *supra* note 50, at 190-91 (Table 86), 198-99 (Table 90), and from the assumptions set forth in text accompanying note 246 *supra*.

[248] *See* text accompanying notes 221-24 *supra*.

[249] Table 4 is based on the data contained in Table 1 and the previous analysis of the ownership of exhibition rights in off-network programming.

Finally, the Commission's conclusion that producers would economically benefit from an increase in sales of first-run syndicated programming assumes either (1) that any increase in prime-time, first-run syndicated programming would not result in a decrease in another program type from which producers derive economic benefit[252] or (2) that the gain in revenue from an increase in the prime-time hours devoted to first-run syndicated programming would be greater than the revenues lost from the resultant decrease in hours devoted to other program types. The Commission's prime-time access rule clearly attempts to encourage an increased use of first-run syndicated programming during prime time at the expense of network programming.[253] While the rule may result in a decrease in the concentration of creative control, there is no evidence that it will *economically* benefit independent producers since no effort was made to undertake the requisite economic analysis.[254]

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[250] 1969 LITTLE REPORT, *supra* note 50, at 154-57 (Table 68).

[251] *See* note 248 *supra*. The total number of hours per year devoted to non-network programming rose from 2043 in 1958 to 2851 in 1958, an increase of 38%. *See* Table 1 *supra*. This resulted from a significant increase in the number of independent stations included in the sample in the 1969 Little Report (from 19 in 1958 to 45 in 1968). 1969 LITTLE REPORT (REV.), *supra* note 213, at 197-98 (Table 89), 204-05 (Table 93). *See* note 245 *supra*. If all stations in the top fifty markets are included, under the previously adopted assumptions (*see* text at note 247 *supra*), the number of prime-time hours devoted to non-network programming increased by 63% while in relative terms the percentage of prime time occupied by non-network programming increased from 40% in 1958 to 50% in 1968.

[252] As was indicated earlier, these include first-run syndication, most off-network programming, 80% of the movies, and all of the producer-licensed network programming.

[253] PTAR I, *supra* note 41, at 395.

[254] Obviously, whether or not a given producer will benefit economically will depend on the nature of its business. If it is primarily involved in production of network programming as opposed to first-run syndication, it will suffer by the mandated decrease in network programming. Conversely, if its programming consists primarily of first-run syndicated programs, it will be benefited by the rule.

The Network Exhibition Market

The Commission also expressed great concern for the economic well-being of independent producers in their dealings with the three networks in the network exhibition market. The Commission found that this market was almost completely dominated by the networks as the result of the shift from advertiser-licensed to producer-licensed network programs,[255] and that the resultant "oligopolistic" market structure placed independent producers at a serious economic disadvantage in dealing with the three networks.[256]

The Commission concluded that the networks were asserting oligopsonistic power in this market because producers were "forced" to cede a substantial portion of their subsequent rights in producer-licensed network programming to the networks,[257] and because producers were "forced" to operate at a deficit in their dealings with the networks.[258] More specifically, the Commission concluded that neither the "giant motion picture" producers nor producers who had supplied at least one program per season for an eight-year period had been able to gain a favorable bargaining position with the networks vis-a-vis one-time suppliers.[259] This conclusion was based on the fact that long-time suppliers and movie producers "ceded" subsequent rights to networks in approximately the same percentage of programs as the "generality of packagers."[260]

This "evidence" of network market power fails to support the Commission's conclusion. First, although the Commission concluded that long-term program suppliers were unable to obtain better treatment from the networks than one-time suppliers, it cited no data whatsoever concerning network acquisition of subsequent rights from one-time suppliers. Furthermore, the Commission's emphasis on the *frequency* with which rights were ceded to the networks ignored the two most significant factors pertaining to the economic relationship between producers and networks: the *magnitude* of the subsequent rights acquired by the networks and the *amount* of the license fee paid by networks to producers. Without such data it is impossible to reach any meaningful conclusions concerning the terms of entry for large and small producers since the networks may have acquired significantly larger profit shares from the smaller producers or paid larger producers a higher license fee.

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[255] In 1957, 43.2% of all network prime-time entertainment programming was producer-licensed. By 1968 this had increased to 92.1%. During the same period, the percentage of prime-time network programming licensed by advertisers decreased from 35.6% to 3.8%. PTAR I, *supra* note 41, at 390.

[256] *Id.* at 389. Since the network exhibition market contains few buyers and many sellers, it is more appropriate to characterize it as an *oligopsonistic* market. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 242 (1970).

[257] PTAR I, *supra* note 41, at 388-89, 393.

[258] *Id.* at 388, 398; Proposed Rulemaking, *supra* note 8, at 2150-51.

[259] PTAR I, *supra* note 41, at 388-89.

[260] *Id.* at 388. In fact, the Commission noted that the terms of entry for the major motion picture producers was less favorable than for "the generality of packagers." *Id.*

Finally, although the Commission indicated that one would expect long-time suppliers to acquire a favorable bargaining position, it did not state why this favoritism should be bestowed in the form of price concessions. The Commission failed to consider the possibility that such favoritism might be shown by preferring one producer over another in the selection of programming for network exhibition because of the networks' past experience with a producer. This possibility would be entirely consistent with the Commission's data indicating that long-time producers have sold at least one program per season from 1957 to 1964.[261]

Much of the Commission's analysis of network power in this market suffers from its erroneous assumption that network acquisition of subsequent rights in producer-licensed programming demonstrated the existence of network oligopsony power. Implicit in the Commission's analysis is the assumption that networks, by virtue of their market power, were able to compel producers to grant them substantial shares of the subsequent rights as a condition of entry into the market at no cost to the networks. Of course, this ignores the very real possibility that networks were in fact *purchasing* these subsequent rights from producers by paying higher license fees.[262]

The Commission's conclusion that networks were asserting oligopsony power was also based on the Commission's discovery that the license fees producers received from networks were, in most cases, less than production costs. As a result, the Commission concluded that producers operated at a deficit and were "forced" to rely upon syndication profits in order to recoup their "losses."[263] However, the existence of network market power cannot be inferred from the fact that producers incurred a net loss as the result of their sale to networks since such a conclusion fails to take into consideration the economic position of producers after exploitation of their subsequent rights.[264] Thus, it would be necessary to take into consideration all of the program revenues received by producers including network license fees *and* total syndication revenue before conclusions could be reached concerning their economic viability and their relative bargaining position vis-à-vis networks.[265]

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[261] For a discussion of producer-network "friendships," see B. OWEN, *supra* note 201, at 21.

[262] Crandall, *supra* note 201, at 492. According to Crandall, "Networks purchase ancillary rights in programs exhibited originally on their networks at prices which reflect *ex ante* expectations of their discounted present value." *Id.* *See also* text accompanying notes 369-85 *infra* (discussion of the financial interest rule).

[263] *See* note 258 *supra*.

It also appears that the Commission's conclusion that producers operate at a substantial deficit after their "sale" to the networks is questionable. The only "data" cited by the Commission to support this conclusion is a reference to an article in *Variety* which stated that "20th Century Fox recoups only 80 percent of its television film costs from network first-run fees."[266] This estimate, however, failed to take into consideration the fees received from networks for the right to repeat episodes. In 1968, networks used twenty-six original and twenty-four repeat episodes for a year-long series.[267] Noll, Peck, and McGowan have estimated that the amount paid by the networks for the right to rerun these episodes was approximately equal to 5 percent of the first-run license fee.[268] According to the Little Report, in 1968 the average first-run license fee for a one-hour episode of an entertainment series was $163,000.[269] Since average production costs in that year were $183,830,[270] it would appear that there was an average deficit of $20,830 (11.3 percent) per episode. This completely ignores the 5 percent rerun fee, which, when included in producers' revenue, reduces the deficit to only 7.2 percent. To the extent that reuse fees exceed 5 percent, the deficit may be even smaller or nonexistent.[271] Furthermore, the Commission also overlooked the fact that, in many instances, networks have agreed to permit producers to recoup excess production costs from profit shares acquired by the networks.[272]

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[264] Revenues from subsequent rights can be substantial. Pearce notes that a popular program is capable of grossing as much as $30 million from domestic syndication alone. A. Pearce, *supra* note 85, at 116. Since, in 1968, the average domestic profit share acquired by the networks was only 22.4%, the producers' share of such profits would be significantly larger than that of the networks. 1969 Little Report, *supra* note 50, at 56 (Table 25).

[265] For an example of such treatment, see R. Noll, *supra* note 201, at 302-13.

[266] PTAR I, *supra* note 41, at 388 n.16. In addition, the staff reported, but the Commission did not cite, considerable testimony by producers to the effect that such deficits exist. Second Interim Report, Part II, *supra* note 1, at 214.

[267] Herman W. Land Associates, Inc., Television and the Wired City 89 (1968) [hereinafter cited as Land]. *See also* Office of Telecommunications Policy, Analysis of the Causes and Effects of Increases in Same-Year Rerun Programming and Related Issues in Prime Time Network Television (1973) [hereinafter cited as OTP Rerun Report].

[268] R. Noll, *supra* note 201, at 310-11.

[269] 1969 Little Report, *supra* note 50, at 41 (Table 15).

[270] Television Magazine, May, 1968, at 22-25.

[271] In 1973, the Office of Telecommunications Policy estimated that reuse fees were approximately 25% of the first-run fee. OTP Rerun Report, *supra* note 267, at 5. If the reuse fee

Finally, it is interesting to note that the Commission concluded that the three networks were able to assert a high degree of oligopsonistic power in the network-exhibition market *without any comparison of profits.* While the Commission did refer in passing to high network profits,[273] at no time did it take into consideration the actual economic position of independent producers. This was a critical oversight because, without such information, it is impossible to conclude that independent producers were actually suffering economic harm as the result of network dominance in this market. Even if the financial evidence revealed that networks were earning an exorbitant return on investment while producers were merely earning a normal rate of return, the mere fact that networks were able to capture all of the excess profits[274] in the industry does not necessarily mean that they were asserting excessive market power.[275] Such a high degree of network profits could be explained by the presence of significant economies of scale in the network process[276] and by a highly competitive supply industry. Economists have, in fact, concluded that the program supply industry is very competitive. There are a large number of sellers in the industry[277] with small individual market

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was actually 25%, there would have been no deficit but rather a 9% "surplus." The existence of production "deficits" may also be questionable in view of the accounting methods employed by producers which frequently include salaries to producers within production costs. *See* A. Pearce, *supra* note 85, at 112.

[272] *See* Crandall, *supra* note 201, at 490. In 1968, 67.7% of the series hours during a sample week were subject to a partial or total recoupment agreement. 1969 Little Report, *supra* note 50, at 61 (Table 30). See also NBC testimony in the Second Interim Report, Part II, *supra* note 1, at 270.

[273] Proposed Rulemaking, *supra* note 8, at 2156 n.37. In 1970 the network profit rate (including profits from owned and operated stations) before taxes on net tangible broadcast property was 134%. R. Noll, *supra* note 201, at 17.

[274] Excess profits are those which exceed a normal rate of return. With respect to producers, Noll, Peck, and McGowan assumed normal profits to be a 12% after-tax return on investment in pilots. R. Noll, *supra* note 201, at 66. A *pilot* is a trial or sample episode of a proposed series usually an hour and a half or two hours long which is used to convince potential purchasers of a series of its merit. *Id.* at 64.

[275] "[N]either monopoly power in advertising markets nor monopsony power in programming markets is required to yield the networks a substantial scarcity rent . . . ." Crandall, *supra* note 201, at 489.

[276] *See* B. Owen, *supra* note 201, at 18-20.

[277] *Id.* at 17-[illegible] 29. Crandall notes that there were 49 different producers of network prime-time entertainment programs in 1967. Crandall, *supra* note 70, at 396. According to the Little Report, there were 51 such producers in 1968. 1969 Little Report, *supra* note 50, at 94 (Table 42). Since both figures refer only to producers who were successful in selling programs

shares which have been observed to be volatile over time;[278] barriers to entry are slight in view of the fact that production factors may be rented;[279] and program production involves no distribution economies. Under such conditions, and in view of the fact that producers are selling differentiated products which are easily substitutable, the industry has been described as monopolistically competitive.[280] In such an industry, according to Owen, Beebe, and Manning, "competition among such producers ensures that no producer will earn profits in excess of a 'normal' rate of return on his capital and skill."[281]

Given the fact that producers are unable to earn profits in excess of a "normal" rate of return due to the competitive nature of the industry, it is clear that network oligopsony power cannot be asserted to force producers to accept lower prices since any such coerced price reductions would drive producers out of business. As one commentator noted: "[I]t is inconceivable that the networks could force suppliers to accept a rate of return on program investments which is below the opportunity cost of capital."[282] Furthermore, it makes little sense to conclude that networks are forcing prices down to a level where producers cannot cover their costs when the number of independently produced television programs is increasing.[283] It is also highly unlikely that networks would want to see a decline in the number of producers "given the importance of maintaining an uninterrupted flow of programs for exhibition."[284]

This discussion has assumed that networks were able to capture 100 percent of the excess profits generated by the network broadcasting process. It has been argued, however, that producers have been able to capture a portion of the excess profits generated in the network exhibition market:

> [T]he networks have not completely suppressed the bargaining power of program owners even though they have obtained shares in profits

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to the networks, it is probable that the total number of producers competing for network sales was larger.

[278] In 1968, the 7 major program producers accounted for only 26% of network program sales, while individual shares ranged from 0 to 8%. B. Owen, *supra* note 201, at 22. *See also* Crandall, *supra* note 70, at 396.

[279] B. Owen, *supra* note 201, at 19.

[280] *Id.* at 17.

[281] *Id.* at 17 note b. Noll, Peck, and McGowan do not share the view that the supply industry is highly competitive since they found that producers were able to capture a substantial share of the scarcity rents. R. Noll, *supra* note 201, at 45-46, 66-67. For a criticism of their conclusions, see text accompanying notes 285-94 *infra*.

[282] Crandall, *supra* note 70, at 508. *See also* R. Noll, *supra* note 201, at 63-66.

[283] Crandall, *supra* note 201, at 399.

[284] *Id.* *See also id.* at 397.

> from off-network syndication . . . . [F]rom 7 to 17 per cent of the amount actually paid for regular series entertainment programming represents *rents* extracted by program owners—payments in excess of those necessary to cover the cost of resources devoted to program production.[285]

Unfortunately, the data used by these authors to obtain the "program owner's share in broadcast revenue from the network run" appear to have been production costs rather than the actual license fees paid by the networks.[286] To the extent that the network fee was less than the cost of production,[287] their estimate of the producers' share of the revenues was overstated. Since a reduction in the program owner's share of broadcast revenue will result in a similar reduction in the amount of any excess profits captured by them, the conclusion that producers were able to successfully bargain for a share of the excess profits is questionable.

It has been further suggested that producers "accumulate" bargaining power if their series becomes successful.[288] When this happens, it is said, the producer will then be able to capture some of the extra profits generated by the program.[289] Owen, Beebe, and Manning base this conclusion on data which indicates that the average price paid by networks for a series increases over time;[290] and Noll, Peck, and McGowan have attempted to quantify this effect, concluding that each rating point above fifteen achieved by a program will result in an average price increase of $1,555.00 per half hour.[291] There are two significant problems with these conclusions. First, these authors fail to explain how a producer can successfully negotiate an increase in his price when the terms of the pilot-series contract between the producer and network, which is executed before the series begins, specify the price the network must pay five to seven years in the future.[292] Second, the fact that program prices increase over time does not necessarily mean that *producers* are capturing the success rents. While it is true that program prices for successful series are often increased even under the restrictive terms of the pilot-series contract, such increases represent escalations to cover specific exigencies set forth in the contract[293] or result from the willingness of networks to make adjustments for increased salary demands of talent.[294] Thus, it would seem, in the absence of any evidence to the contrary, that increases in program prices for a successful series do not represent the acquisition of excess profits by producers but rather consist of pre-arranged price escalations and excess profits captured by talent, not producers.

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[285] R. Noll, *supra* note 201, at 66. In reaching this result, these authors compared an estimated "minimum share of revenue networks would have had to give up in order to insure program owners an expected 12 percent after tax rate of return on pilots, given the network shares in syndication profits" with "the average share of revenues actually given up." *Id.*

[286] The producers' "actual share of broadcast revenue" for 1968 was taken from *Television Magazine*. The authors note that "average cost was computed from data for the 1965-66 through the 1968-69 seasons appearing in the annual 'Telecast' article provided by *Television Magazine*." R. Noll, *supra* note 201, at 311. The "Telecast" article for the 1968-69 season lists all programs on the three network schedules giving "the show's title, its sponsors, their agencies, the *estimated production cost* of a single original in a series, the asking price to advertisers . . . , and the production source of each show." Television Magazine, May, 1968, at 22 (emphasis added).

[287] For a discussion of production deficits, see text accompanying notes 263-76 *supra*.

[288] R. Noll, *supra* note 201, at 65; B. Owen, *supra* note 201, at 38. For this reason, networks bargain for a share of the subsequent rights at the outset "when their bargaining power is greatest . . . ." *Id.* at 65.

[289] R. Owen, *supra* note 201, at 38. Noll, Peck, and McGowan suggest that when his program becomes successful, the producer "becomes a monopolist dealing with three competing networks." R. Noll, *supra* note 201, at 45.

[290] B. Owen, *supra* note 201, at 38.

[291] R. Noll, *supra* note 201, at 45.

ANALYSIS OF THE COMMISSION'S ASSUMPTIONS CONCERNING CONCENTRATION OF CREATIVE CONTROL

The Commission also concluded that creative control of network and non-network prime-time entertainment programming was concentrated in the three networks[295] and that the networks "in large measure determine what the American people may see and hear during the hours when most Americans view television . . . ."[296]

Network Programming

The Commission found that network creative control of network programming stemmed from the deep involvement of networks in the creative aspects of producer-licensed network programming which, in 1968, accounted for 92.1 percent of all network, prime-time programming.[297] When the hours of prime-time programming which were produced by the networks are added, the percentage of prime-time hours creatively controlled by networks amounted to 96.2 percent in 1968,[298] while only the remaining 3.8 percent was creatively controlled by advertisers.[299]

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[292] A. PEARCE, *supra* note 85, at 112. Only in the unlikely event that a series remains on the network longer than this five to seven-year period will producers be able to bargain for a share of the excess profits. *Id.* at 115.

[293] These contracts normally include a set escalation clause of 5%. *Id.* at 114.

[294] *See* R. NOLL, *supra* note 201, at 63 n.10; B. OWEN, *supra* note 201, at 38.

[295] Proposed Rulemaking, *supra* note 8, at 2147, 2153-54, 2157; PTAR I, *supra* note 41, at 389, 394.

[296] Proposed Rulemaking, *supra* note 8, at 2147.

[297] PTAR I, *supra* note 41, at 390.

Non-Network Programming

In addition to exercising creative control over programs broadcast in the network exhibition market, the Commission also concluded that networks exercised creative control over a substantial proportion of programs broadcast in the non-network exhibition market in view of their control over off-network programming. This was said to result from the fact that networks creatively controlled such programming when it was originally produced for network exhibition.[300]

While it is clear the programming controlled creatively by the networks almost completely dominates the network exhibition market, an analysis of the non-network exhibition market reveals that in 1968 only 25 percent of all non-network programming was creatively controlled by the three networks, while producers creatively controlled 41 percent of such programming:

TABLE 5

Concentration of Creative Control in the Non-Network Exhibition Market—1968[301]

	Average Weekly Hours	Percent of Total Hours
Networks	706	25
Producers	1166	41
Advertisers	53	2
Non-Television Movie Producers	139	5
Local Producers	787	27
Total	2851	100

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[298] *Id.*

[299] *Id.* While the Commission assumed that advertisers exercised little or no creative control over programs they licensed from producers for network exhibition, the evidence is to the contrary. Advertisers controlled the creative aspects of programs in great detail. Barrow notes that, during the programming inquiry, "a network official testified that the advertiser or agency might participate in the creative phases of serious drama or entertainment 'at every step and as to every element of the process,' " and that "[s]cripts were edited by advertisers and agencies to render the show compatible with the product." Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 637 n.14 (1966).

[300] PTAR I, *supra* note 41, at 389. *See also* Proposed Rulemaking, *supra* note 8, at 2154-57.

[301] *See* Tables 1 and 2 *supra*. The figures in Table 5 are based on the assumption that 1968 off-network programming was made up of the same proportion of producer-licensed, advertiser-licensed and network-produced programs as network programming exhibited between 1962 and 1966. See text accompanying notes 220-23 *supra*. Since networks *creatively* con-

In view of these data, the Commission's conclusion that programs creatively controlled by the networks dominated the non-network program market in 1968 must be rejected.[302]

The General Program Exhibition Market

For a more realistic test of the Commission's conclusion that networks creatively controlled "the entire television program process" in 1968,[303] the general exhibition market, consisting of prime-time entertainment programming exhibited on all stations in the top fifty markets, should be examined. As can be seen from Table 6, 66 percent of such programming was creatively controlled by the networks in 1968 while only 18 percent was controlled by producers:

TABLE 6

Concentration of Creative Control in the General Program Exhibition Market—1968[304]

	Average Weekly Hours	Percent of Total Hours
Networks	4368	66.0
Producers	1166	17.5
Advertisers	198	3.0
Non-Television Movie Producers	139	2.0
Local Producers	787	11.5
Total	6658	100.0

It was this concentration of *creative* control which gave rise to the Commission's concern for the viability of first-run syndicated programming. Since both network and off-network programming were,

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trolled both network-produced and producer-licensed programming, the off-network hours made up of such production types are attributed to the networks, while the remainder is attributable to advertisers. The producers' share includes all of the hours devoted to first-run syndicated programming and 80% of the hours devoted to movies. *See* text accompanying notes 234-36 *supra*. Twenty percent of the hours devoted to movies are attributed to non-television movie producers, and all of the hours devoted to local programming are attributed to local producers.

[302] The Commission also concluded that the networks creatively controlled the syndication market: "[T]he great bulk of the programming available for syndication . . . consists of 'off-network' product." Proposed Rulemaking, *supra* note 8, at 2156. Presumably the Commission considered the syndication market to be made up of first-run syndicated and off-network programming. Even if this were a reasonable market for determination of creative control, the percentage of programming creatively controlled by the networks in this artificially narrow syndication market was only 51.5% in 1968 while 44.6% was controlled by producers and 3.5% by advertisers.

[303] PTAR I, *supra* note 41, at 389.

[304] The figures in Table 6 were obtained by adding the weekly hours of network programming controlled by each entity to the hours of non-network programming so controlled as set forth in Table 5.

for all practical purposes, creatively controlled by the three networks, the Commission viewed the decline of first-run syndicated programming[305] and the increased use of off-network programming as a threat to the diversity of prime-time entertainment programming. Thus, while it makes little sense to argue that producers were *economically* disadvantaged because of the decline of first-run syndication sales and the concomitant increase in sales of off-network programming, since producers controlled both *economically*, there was reason for concern at the concentration of creative control which resulted from network creative control over both network and off-network programming.

THE PROGRAM PROCUREMENT RULES

The Commission concluded that the concentration of creative control adversely affected the public interest by significantly reducing the diversity of high quality prime-time programming[306] and by limiting the ability of local stations to make meaningful program choices in fulfillment of their responsibility for broadcasting in the public interest.[307] In 1965 and 1970, the Commission considered two quite different approaches to these obviously interrelated problems. In its proposed rules, the Commission sought to increase diversity in *network* programming by mandating a substantial return to the advertiser-licensed network program. However, by adopting the prime-time access rule in 1970, the Commission chose to create a new market for first-run syndicated programming in an attempt to provide additional sources of diverse *non-network* prime-time programming.

Before analyzing the potential efficacy of these two approaches, it is necessary to distinguish two different concepts of diversity: diversity of source and diversity of programming. In broadcasting, diversity of source refers to a multiplicity of separately owned and controlled sources of television programming,[308] while diversity of programming refers to actual diversity in the kind of programming broadcast by local television stations.[309] The two concepts are interrelated to the extent that it is assumed that an increase in diversity of source will result in an increase in program diversity.[310] In both the proposed fifty-percent rule and the prime-time access rule, the Commission announced that its main purpose was to increase the number of different *sources* of "network quality" prime-time programming in the hope, or under the assumption, that there would be a concomitant increase in the diversity of prime-time programming.[311]

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[305] As was pointed out earlier, the Commission's conclusion that first-run syndicated programming had "virtually disappeared" was erroneous. *See* text accompanying notes 240-42 *supra*.

[306] PTAR I, *supra* note 41, at 395. *See* text accompanying notes 114-28 *supra*.

[307] PTAR I, *supra* note 41, at 397, 400; Proposed Rulemaking, *supra* note 8, at 2148-49, 2156.

[308] For rules dealing specifically with multiplicity of source, see the Commission's multiple ownership rules, 47 C.F.R. § 73.636 (1976).

[309] Program diversity is generally measured by the number of program categories or program types which are offered during a given time period. *See, e.g.*, Table 7 *infra*. The eco-

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nomic literature concerning diversity in broadcasting is extensive. *See, e.g.*, Land, note 267 *supra*; B. Owen, Diversity and Television (1972); Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. Econ. 15 (1977); Blank, *The Quest for Quantity and Diversity in Television Programming*, 56 Am. Econ. Rev. 448 (Supp. 1966); Dominick & Pearce, *Trends in Network Prime-Time Programming 1953-74*, 26 J. Com. 70 (1976); Goodhardt & Ehrenberg, *Duplication of Television Viewing Within and Between Channels*, 6 J. Marketing Research 169 (1969); Greenberg & Barnett, *TV Program Diversity—New Evidence and Old Theories*, 61 Am. Econ. Rev. 89 (Supp. 1971); Hall & Batlivala, *Market Structure and Duplication in TV Broadcasting*, 47 Land Econ. 405 (1971); Levin, *Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings*, 61 Am. Econ. Rev. 81 (Supp. 1971); McGowan, *Competition, Regulation, and Performance in Television Broadcasting*, 1967 Wash. Univ. L.Q. 499; Rothenberg, *Consumer Sovereignty and the Economics of TV Programming*, 4 Stud. Pub. Com. 45 (1962); Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. Econ. 194 (1952); Wiles, *Pilkington and the Theory of Value*, 73 Econ. J. 183 (1963).

[310] Not surprisingly, there has been considerable debate concerning diversity of source and diversity of programming. The assumption that an increase in the diversity of source will increase diversity of programming is not universally accepted. Former Commissioner Nicholas Johnson states that "[a]lthough diversity of ideas rather than multiplicity of forums has been the goal of the first amendment, multiplicity of forums has seemed a useful means to that end." He also noted that:

> the major thrust of the FCC decisions, as well as that of the antitrust laws, has been to promote multiplicity of forums. The reason for this is fairly obvious. Feeling the constraints of the First Amendment, the Commission has sought in its actions to create a true broadcast "marketplace of ideas" open to all views, and yet to remain "content neutral" at the same time.

Johnson, *supra* note 77, at 343-44, 367. *See also* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487, 498 (1969); Coase, *The Economics of Broadcasting and Government Policy*, 56 Am. Econ. Rev. 440 (Supp. 1966).

[311] PTAR I, *supra* note 41, at 397. Elsewhere the Commission described the purpose of the prime-time access rule as serving "the public interest in diverse broadcast service . . . ." *Id.* *See also* Proposed Rulemaking, *supra* note 8, at 2160-61, 2162. The Commission has consistently taken the position that, under the first amendment, it may not directly mandate diversity of programming. *See* Second Interim Report, Part II, *supra* note 1, at 2. The issue, however, is not settled. In a memorandum to the Commission, FCC General Counsel Henry Geller advised the Commission that the Supreme Court's opinion in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), "constitutes ample *legal* authority for the Commission . . . to specify minimum percentages of time to be devoted to various programming categories provided a reasonable public interest basis is demonstrated for the specification." Memorandum From General Counsel to the Commission, 20 Rad. Reg. 2d 381, 384 (1969) (emphasis in original). For a similar view, see the concurring opinion of Commissioner Cox in the adoption of the prime-time access rule. PTAR I, *supra* note 41, at 421-22. For an earlier discussion of FCC program regulations, see Network Broadcasting, *supra* note 1, at 145-46. *See also* Kennedy, *Programming Content and Quality*, 22 Law & Contemp. Prob. 541 (1957); Loevinger, *The Issues in Program Regulation*, 20 Fed. Com. B.J. 3 (1966).

The Prime-Time Access Rule

By adopting the prime-time access rule, the Commission sought to increase the hours of prime-time programming supplied independently of network creative control. This was to be accomplished either through the entry of new suppliers or by expansion of existing sources of first-run syndicated programming. To accomplish this, the Commission artificially increased the number of potential buyers of prime-time programming by eliminating the network brokerage function from one-half hour of prime time per evening.[312] As a result, producers will be forced to deal directly with local stations and, to the extent they are successful, the portion of prime-time occupied by first-run syndicated programming will increase.

The extent of the increase in prime-time first-run syndicated programming will depend on the ability of producers to compete successfully with local programming and older movies.[313] If past non-network programming patterns continue, the expansion of non-network time mandated by the rule will result in a significant increase in the hours of prime-time devoted to first-run syndicated programming on affiliated stations.[314] This increase may be offset to some extent, however, by a *decrease* in the use of first-run syndicated programming on independent stations. This would occur if independent stations, which may exhibit off-network programming during access time,[315] are unable to compete with the economically stronger affiliated stations for exhibition rights to first-run syndicated programming. This is especially true in view of the sharp increase in demand for such programs which will be engendered by the rule.[316]

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[312] Although the rule prohibits affiliated stations from carrying more than three hours of network programming during the four-hour period between 7 and 11 p.m., the rule effectively eliminated only one-half hour of network programming since networks offered only three and one-half hours of network programming during prime time prior to the rule. PTAR I, *supra* note 41, at 395.

[313] In response to numerous petitions for reconsideration, the prohibition against exhibiting movies during access time was limited to movies which had been exhibited in the market within the previous two years. Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C.2d 318, 333-34 (1970).

[314] Twenty-seven percent of the hours devoted to programming other than network or off-network programs between 6 and 7 p.m. on affiliated stations in 1968 was devoted to first-run syndicated programs. 1969 LITTLE REPORT (REV.), *supra* note 213, at 196-97 (Table 89). If affiliated stations continue to devote 27% of such programming to first-run syndicated programs after the effective date of the rule, there will be a 110% increase in the number of hours devoted to first-run syndication programming. The 6-7 p.m. period was chosen for this analysis rather than the first hour covered by the rule (7-8 p.m.) because the 6-7 p.m. period contained the least amount of network programming in 1968 and would therefore be more indicative of affiliated station programming patterns in the absence of network programming.

[315] Independent stations will probably prefer off-network programming to first-run syndicated programs because off-network programming is cheaper and is more likely to attract larger audiences, particularly when there is no competition from network programming. Off-network programs are likely to be cheaper than first-run syndication even though distribution costs are the same because revenues derived from first-run syndicated programming must be

Thus, it is reasonable to expect that the Commission's creation of a relatively "competition-free haven"[317] for first-run syndication on network affiliated stations will result in a substantial increase in the quantity of first-run syndicated programming exhibited during prime time on stations in the top fifty markets. Furthermore, given the low barriers to entry in the program production industry, it is also reasonable to expect that the expansion of the market for first-run syndication will attract new program sources.[318]

It is clear from the Commission's report that the prime-time access rule was not an attempt to increase program diversity without regard to quality. The rule was designed to encourage the production of programming which would be competitive with network offerings, and the Commission frequently referred to the need to increase the exhibition of " 'quality' film entertainment,"[319] "prime time quality programs,"[320] and "quality high cost programs."[321] For this reason, it is reasonable to ask whether the increased market for first-run syndicated programming will result in the production of network quali-

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applied to the full production costs of the program, whereas off-network programming need only meet the residual fees which are significantly less than production costs. B. OWEN, *supra* note 201, at 33.

[316] For this reason it is doubtful that the rule will benefit the development of UHF stations as envisioned by the Commission. PTAR I, *supra* note 41, at 394, 395. *See also* Proposed Rulemaking, *supra* note 8, at 2157. Independent UHF stations will have to compete with the affiliated VHF stations for the new first-run syndicated programming stimulated by the rule. However, in view of the fact that affiliated VHF stations attract larger viewing audiences even for non-network programming than unaffiliated UHF stations, producers of first-run syndication programming will only sell to the UHF station in a given market if it cannot sell the program to one of the affiliated VHF stations in that market. *See* R. NOLL, *supra* note 201, at 86. *See also* Commissioner Burch's dissent to the prime-time access rule. PTAR I, *supra* note 41, at 414. For a discussion of the UHF handicap, see note 50 *supra*.

[317] Although the Commission states that "it is not . . . our intention . . . to carve out a competition free haven for syndicators," to the extent that it has prohibited networks from competing for station time, this is precisely what it has done. PTAR I, *supra* note 41, at 397. The rule also protected access programming from competition by network programming exhibited on other stations in the market during access time. *See* note 327 *infra*.

[318] For a discussion of barriers to entry in the program production market, see note 277 *supra*.

[319] Proposed Rulemaking, *supra* note 8, at 2149 n.14.

[320] PTAR I, *supra* note 41, at 386.

[321] *Id.* at 397. Inexplicably, despite the Commission's continued reference to the need for high quality, syndicated programming, in concluding its report it stated that: "[W]e emphasize again that it is not our objective or intention to . . . promote the production of any particular type of program—whether or not it be included within the present category of quality high cost programs." *Id.*

ty programming for the new "access" period.[322]

During the rulemaking proceedings, several parties argued that the production costs and financial risks involved in the production of first-run syndicated programming were too great to be undertaken by individual producers.[323] The Commission rejected these arguments, noting that various producers had testified that: "[G]iven reasonable access to top rated evening time in the top 50 markets, program producers—both present and potential—can and will supply programs for the syndication market reasonably competitive with network prime time offerings."[324] The Commission agreed with these witnesses, noting that increased production costs were not necessarily a bar to the production of first-run syndicated programming: "It is familiar doctrine that dollar costs in television are not as crucial to economic success as are the costs an advertiser must incur to place his message before his prospective customers. A higher dollar cost to reach a larger audience is acceptable to most advertisers."[325]

Thus, the Commission concluded that, while the production costs of high quality programming might well be prohibitive in low-rated time, such costs will be acceptable in "high-rated time" because of its larger audiences.[326] The Commission reasoned that, since the rule will give independent producers access to one hour of "high-rated time" each evening without competition from network programming,[327] their first-run syndicated programs will be able to attract large audiences with a resultant cost per thousand acceptable to national advertisers. However, to the extent that production costs of "quality high cost" first-run syndicated programming are similar to those incurred in the production of programming for network exhibition, the Commission's optimism was seriously misplaced.

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[322] It is assumed that the term "quality" as used by the Commission is directly related to production costs. Owen, Beebe, and Manning have noted that "it is generally valid to speak of program 'popularity,' 'quality,' and cost as being highly correlated." B. OWEN, *supra* note 201, at 96. *See also* A. PEARCE, *supra* note 85, at 30. Manning cites "[c]olor shows, better technical production, longer episode shooting schedules, more careful editing, etc." as examples of the relationship between cost and quality. Manning, *The Supply of Prime Time Entertainment Programs* 58, Memorandum No. 152, Center for Research in Economic Growth, Stanford University (1973). *See also* the OTP Rerun study, which suggests that networks engage in non-price competition by attempting to acquire more popular actors, more successful writers and producers, better sets, and by employing on-location shooting. OTP Rerun Report, *supra* note 267, at 6.

[323] PTAR I, *supra* note 41, at 396.

[324] *Id.* The Commission also rejected this argument on reconsideration. Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C.2d 318, 321-25 (1970).

[325] PTAR I, *supra* note 41, at 396.

[326] *Id.*

[327] Although the rule was designed to provide a one-hour period during which access programming could be exhibited without competition from network programming, it failed to specify which hour of prime time must be free of network and off-network programming. As a result, it was entirely possible that affiliated stations in the same market would utilize different hours during prime time for access programming. In such a market, network programming would be available to the viewer throughout prime time and access programming would have

The Commission's assumption that independent producers will be able to produce first-run syndicated programming of comparable costs to network programming for the new access period is unreasonable in view of the fact that first-run syndicated programming cannot be expected to generate revenues which even approach those derived from network programming and because first-run syndication nonproduction costs greatly exceed such costs for network programming.

Revenues from first-run syndicated programming exhibited during prime time will be substantially less than revenues from comparable network programs because independent producers will not be able to achieve market penetration levels similar to those regularly achieved by the networks, given the extremely high percentage of network programming "cleared" by network affiliates.[328] Thus, in order to even have an opportunity to attract comparable size audiences, producers will have to sell their programs to local stations in virtually all of the top fifty markets. As was pointed out by Chairman Burch, however, in the absence of a semi-permanent affiliation agreement with stations in the top fifty markets, it is highly unlikely that independent producers will be able to achieve network penetration levels.[329]

The ability of first-run syndicated programming to attract audience levels comparable to network programming will be further limited by the networks' decision to restrict network programming to the last three hours of prime time.[330] As a result of this decision,

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to compete with it. *See* Crandall, *supra* note 70, at 407 n.39. The problem was rectified when the networks, in response to a request from the Commission, agreed to restrict their programming generally to the 8-11 p.m. time period. PTAR II, *supra* note 6, at 1091; Prime Time Rule, 21 Rad. Reg. 2d 1586 (1971).

[328] *See* Proposed Rulemaking, *supra* note 8, at 2149 n.14.

[329] *See* text accompanying note 162 *supra*. Pearce estimates that, for two showings of a half-hour program during access time, a first-run syndicated program can expect at most $70,000 in total revenue, whereas a producer of a network program would expect a fee of between $90,000 and $125,000. A. PEARCE, *supra* note 85, at 118. Noll, Peck, and McGowan note that the gross revenue of a first-run syndicated program with a given anticipated rating would probably be less than one-third of the gross revenue of the same program on a network, concluding that "[u]nder these conditions, it can be profitable to invest only in first-run syndicated programs in which the cost per episode is substantially lower than that for network programming." R. NOLL, *supra* note 201, at 85.

[330] *See* note 327 *supra*.

access programming will be relegated to the first hour of prime time, a period known for lower audience levels:

> The program death rate in this time period has always been high due to the fact that the audience is in a transition stage, relying heavily on children and old people, two groups lacking major advertiser appeal. Young people and adults, aged from 18 to 49, the most desirable group of television watchers from the advertisers viewpoint, tend to view television beginning at about 8 p.m. onwards . . . .[331]

In its discussion of the economic feasibility of first-run syndicated programming, the Commission also overlooked the great disparity between first-run syndication and network non-program costs[332] which will seriously undermine the ability of producers to produce network quality programming for first-run syndication. Elsewhere in its report, however, the Commission acknowledged this disparity.[333] Quantitative comparisons between networks and first-run syndicated non-production costs have been made. Owen, Beebe, and Manning note that non-program costs in first-run syndication have been estimated to be between 25 percent and 38 percent of total costs, while network non-production costs amounted to only 12 percent of total costs.[334] Assuming that production costs were identical for a network program and a "network quality" first-run syndicated program and that first-run syndicated non-production costs were 30 percent of total costs while network non-production costs were 12 percent of total costs, the total cost of an hour-long first-run syndicated program in 1968 would have been $53,716 higher per episode than an hour-long network program. This large cost differential coupled with the fact that revenues from first-run syndication will undoubtedly be significantly lower than network revenues indicates that, in the absence of a semi-permanent affiliation arrangement with a large number of stations and economies of scale, independent producers will not be able to supply "high cost, network quality" programming for the newly created access period. As a result, the programming which will be offered will be those kinds of programs which can be produced relatively cheaply and still attract reasonably large audiences. As Chairman Burch concluded in his dissent, these will undoubtedly include game, light entertainment, and talk shows.[335]

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[331] A. PEARCE, *supra* note 85, at 39-40. The Commission also overlooked the relative ability of first-run syndicated and network programming to derive revenue from syndication. Crandall, *supra* note 201, at 496 n.23. These profits can be quite substantial. *See* note 264 *supra*. However, the chance that a sufficient number of original episodes of a first-run syndicated series will be produced to make subsequent syndication profitable is much smaller than it is for network programming. It has been estimated that network programs must remain on a network for at least two years in order to be selected for off-network syndication. R. NOLL, *supra* note 201, at 311. In their comments filed in PTAR II, producers indicated that "the hope is for the program to be successful, so that it continues in production and exhibition for four years, and the entire package of 104 or so episodes can then be sold on a 'strip' basis." Stripping is the daily exhibition of series episodes rather than the normal weekly exhibition. PTAR II, *supra* note 6, at 1111. Owen, Beebe, and Manning, however, note that only 13% of all first-run syndicated programs introduced in the 1960s lasted for more than one season and only 3% lasted longer than two seasons. R. NOLL, *supra* note 201, at 77. Data from the Little Report indicates that only 10.4% of the first run syndicated series introduced in 1967 were retained for more than one season. 1969 LITTLE REPORT, *supra* note 50, at 76 (Table 35). Although these figures refer to first-run syndicated programming exhibited prior to the adoption of the prime-time access rule, since the rule will not enable producers to produce network quality programming nor achieve network audience sizes, there is little reason to assume that such programming will fare substantially better as the result of the rule.

[332] Non-production costs include distribution and transaction costs. *See* note 334 *infra*.

[333] PTAR I, *supra* note 41, at 386-87. Owen, Beebe, and Manning illustrate the difference in transactional costs by pointing out that if there are X stations and Y advertisers, in the first-run syndication market there will have to be X times Y contracts written between stations and advertisers. In the network market, however, if the X stations are a given network's affiliates there will only have to be $X + Y$ contracts, X contracts of affiliation and Y contracts with advertisers. B. OWEN, *supra* note 201, at 19 note d. *See also* R. NOLL, *supra* note 201, at 59, 63-64; A. PEARCE, *supra* note 85, at 118; Crandall, *supra* note 70, at 407.

The Commission's conclusion that network practices led to a reduction in program diversity was based on the testimony of several witnesses[336] and upon the assumption that the concentration of creative control invariably reduces diversity of programming.[337] Thus, the Commission attempted to augment program diversity by adopting a rule which would increase the number of prime-time programs produced independently of the networks.[338] The assumption that program diversity could be significantly increased by increasing the number of entities making programming decisions ignored the economics of the demand side of the programming process. The Commission assumed that by removing the network funnel from one hour of prime-time programming each day, local stations would be free to purchase first-run syndicated programming directly from numerous producers and that, given this opportunity, the programs selected by these stations would be significantly more diverse than the network programs they replaced.

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[334] First-run syndication non-production costs include those for making extra prints, those for advertising the series, and those incurred in distribution and sales. Network non-production costs include those associated with sales, distribution, and administration. B. OWEN, *supra* note 201, at 34, 41-42.

[335] PTAR I, *supra* note 41, at 413-14. *See also* R. NOLL, *supra* note 201, at 89; B. OWEN, *supra* note 201, at 137-38. On reconsideration, petitioners argued that programming induced by the rule would probably consist of "additional talk, interview, game, animal, contemporary and country western music shows of the type currently being offered in the tape syndication business." Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C. 2d 318, 322 (1970). This prediction should not be surprising in view of the fact that more than half of the first-run syndicated programs exhibited in 1968 consisted of talk and game shows. *See* Table 7 *infra*.

[336] *See* note 118 *supra*.

[337] PTAR I, *supra* note 41, at 394. *See also* Proposed Rulemaking, *supra* note 8, at 2147, 2153-54. The Commission, however, offered no empirical data to support its conclusion that there has been a significant diminution in program diversity on network television. One recent study found that the diversity of network programming in 1970 was almost equal to that in 1958. Dominick & Pearce, *supra* note 309, at 77. *See also* Table 7 *infra*.

[338] "A principal purpose of our prime time access rule is to make available an hour of top-rated evening time for competition among present and potential nonnetwork program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in

It is clear, however, that a rule which transfers the program selection function from networks to affiliated stations will only lead to significant changes in the nature of prime-time programming if the affiliated stations make their programming decisions on a different basis from that employed by the networks. Obviously, networks have concluded that profits can be maximized only by exhibiting programming designed to attract the largest possible audience[339] and that the maximum audience can be achieved only by programming designed to appeal to general rather than special interest viewers.[340] Given this rationale for network program selection, it makes no sense to expect different behavior on the part of local stations when they choose independently produced access programs. Individual stations also seek to maximize audience size, and, for this reason, they will select programs which they think will attract the most viewers at the least cost—precisely the same considerations that determine network choices.[341]

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diverse broadcast service may be served." PTAR I, *supra* note 41, at 397. *See also* Proposed Rulemaking, *supra* note 8, at 2148.

[339] The larger the audience attracted to a given program, the greater the revenue derived therefrom. Whether or not attracting larger and larger audiences will result in increased profits is a function of the additional program cost required to increase audience size. To the extent that the marginal cost of attracting an additional viewer is less than the marginal revenue derived from the resultant increase in audience size, profits will be increased. *See* R. NOLL, *supra* note 201, at 10-11 n.26; B. OWEN, *supra* note 201, at 96-97. The factors determining the level of network program expenditure are complex and involve the dynamics of oligopolistic pricing. *See generally* F. SCHERER, note 256 *supra*.

[340] R. NOLL, *supra* note 201, at 50; B. OWEN, *supra* note 201, at 99; Crandall, *supra* note 70, at 393. Both networks and local stations broadcast a small amount of programming which is not intended to compete for the maximum audience but rather is designed to satisfy the Commission's requirement that stations broadcast a certain amount of "public interest programming." *See Network Programming Inquiry*, 25 Fed. Reg. 7291, 7293-95 (1960). *See* note 347 *infra*.

[341] Commissioner Cox agreed, noting that he had

> no illusions that, in the process, we are going to get better programming. I recognize that the economic motives of the local affiliates are the same as those of the networks. I simply hope that we will get somewhat more varied programming, with more people involved in the creative process, and without forcing everything through the network funnel.

It may be argued that increasing the number of entities determining which programs will maximize viewing audiences from the three networks to 150 local stations will result in greater program diversity since the opportunity for divergence of opinion as to which programs will in fact maximize audiences will be increased.[342] However, such effects will be relatively short-lived since programs which fail to capture a share of the audience which approximates the station's pro rata share will be replaced until that share is reached.[343] Furthermore, producers of first-run syndication programming will not continue to offer programs which are not purchased by a significant number of stations in the top fifty markets, and they will cancel such unsuccessful programs and substitute others until they are successful.[344]

The Commission staff expressed great concern with the fact that there were virtually no prime-time, entertainment programs designed to appeal to specialized minority audiences who wished to see "original drama," "good theatre," or "children's programs."[345] The Commission correctly attributed the lack of such programming to the fact that networks and stations select programs which will appeal to maximum audiences. Minority audiences are ignored be-

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PTAR I, *supra* note 41, at 418. *See also* Crandall, *supra* note 70, at 407; Levin, *supra* note 309, at 83-84.

[342] In his concurring opinion, Commissioner Cox concluded:

> [I]f these new producers simply turn out more of the same, the public will at least be getting "more games, more light entertainment along proven formulas, more 'emcee' talk shows" from more different sources and without everything having been homogenized to fit the tastes of only three small groups of people. If this results in the development of a healthy syndication industry, it seems to me that we will have somewhat increased the chances that new program concepts will be attempted. Certainly continuation of the present system would guarantee more of the same, so we are losing nothing by making that effort to increase competition.

PTAR I, *supra* note 41, at 419 (Cox, Comm'r, concurring).

[343] Generally, a pro rata share is determined by dividing the total number of homes viewing by the number of stations in the market. However, network affiliated stations in four or more station markets have higher expectations. *See* note 348 *infra*.

[344] For this reason, it has been suggested that the rule will simply lead to the creation of new "access" networks which will enter into affiliation agreements with stations subject to the rule (as well as with as many stations in the smaller markets as possible) to provide one hour of programming per night. Crandall, *supra* note 70, at 406-07. *See also* Commissioner Robinson's dissent to PTAR III, *supra* note 6, at 901.

[345] SECOND INTERIM REPORT, PART II, *supra* note 1, at 30. *See also* text accompanying note 238 *supra*. Barrow describes these limited audience appeal programs as including "news, public affairs, significant original drama, opera, ballet, classical music and children's programs." Barrow, *supra* note 299, at 636 n.11. Despite this concern for special interest programming, the Commission indicated that it was also concerned with diversity of "mass appeal" programming: "[e]xisting practices and structure combined have centralized control and virtually eliminated needed sources of *mass appeal programs* competitive with network offerings in prime time." PTAR I, *supra* note 41, at 394 (emphasis supplied).

cause the number of viewers who could be attracted to such specialized programming is substantially less than the share of the general audience a given broadcaster hopes to capture. Thus, if one assumes that the size of the potential audience is constant regardless of what programming is offered,[346] that there are three stations in the market, and that 10 percent of the audience could be attracted by a special interest program,[347] it is clear that none of the stations in the market would forego the opportunity of capturing 33 percent[348] with mass appeal programming in order to obtain an audience consisting of 10 percent of the viewers.[349]

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[346] The size of the viewing audience at any given time is virtually constant regardless of the programming offered and varies only seasonably. Owen, Beebe, and Manning note that "the average total prime-time audience . . . in the month of April between 1953 and 1972 varied almost at random between a minimum of 57.3 (1963) and a maximum of 62.0 (1957)." B. OWEN, *supra* note 201, at 95-96. Land points out that the introduction of public television did not attract new viewers to television but simply diverted those from the pre-existing audience. LAND, *supra* note 267, at 24.

[347] Land found that the audience share attracted to several prime-time network documentary specials broadcast in 1967-68 ranged from 6.5 to 15.5% of total homes viewing television at that time. Documentaries on independent stations in New York City fared much worse, attracting from 0.8 to 2.0% of home viewing. Even when a network documentary (CBS Town Meeting of the World) was exhibited in competition with reruns on the other networks, Land found that the documentary attracted only 10.6% of the viewing homes. LAND, *supra* note 267, at 127-28. With respect to public broadcasting, Noll, Peck, and McGowan found that the average prime-time audience of VHF public television stations in the 10 largest cities was only 1% of the television homes viewing. R. NOLL, *supra* note 201, at 82.

[348] In markets with more than three stations, the networks must also compete with the additional independent and non-commercial stations. However, these stations have accounted for only about 10% of the total viewing audience. Thus, it is realistic to characterize networks as attempting to capture a minimum of 30% of the total audience. B. OWEN, *supra* note 201, at 41.

[349] Hall and Bathvala have pointed out that

> [b]asically, the entire FCC approach ignores the underlying causes of duplication that have been understood for many years. According to a generally accepted theory among economists, duplication arises from the ability of individual channels to attract more audience by sharing the audience for the most popular program types rather than catering to the choices of smaller groups of viewers.

Hall & Bathvala, *The Prime-Time Rule: A Misadventure in Broadcast Regulation?*, 17 J. BROADCASTING 215, 220 (1973). Commissioner Cox made a similar observation in his concurring opinion to PTAR I: "[I]f the time period is one in which maximum audiences are available, broadcasters will normally seek programming to attract large numbers of viewers—whether at the network or the local level." PTAR I, *supra* note 41, at 417 (Cox, Comm'r, concurring). From this analysis it is also clear that the creation of a fourth network, even if it had access to all markets, would not result in an increase in diversity of program type since the new network would compete with existing networks for a pro rata share of the general audience. Noll, Peck, and McGowan suggest that there would probably have to be six networks before one of them would attempt to capture a special interest audience consisting of 15 to 20% of the viewing audience. R. NOLL, *supra* note 201, at 52-53. *See generally* Park, *New Television Networks*, 6 BELL J. ECON. 607 (1973).

Thus, since the type of programming selected for television exhibition is a function of the number of channels in the market, a rule which simply excludes networks and transfers prime-time programming decisions to local stations cannot be expected to result in a significant increase in program diversity[350]—unless the differences in costs between network and access programming are such that cost restraints result in the production of different program types for the access period. As was noted earlier, due to the large disparity in non-program costs and revenue potentials, access programming will not consist of "high quality" network type programming.[351] Assuming that first-run syndicated programming developed for the access period will consist primarily of the kind of programming offered in the first-run syndication market prior to the rule, the figures in Table 7 indicate that the rule will result in an increase in the diversity of prime-time programming on affiliated stations:[352]

TABLE 7

Percentage of Half-Hours Devoted To Given Program Types—1968[353]

	First Run Syndication	Network
Music, Variety & Personality	36	12
Interview & Talk	39	0
Documentary	0	0
Adventure, Science Fiction & Drama	2	16
Mystery & Police	0	15
Western	0	18
Comedy	0	35
Special Interest: Women's	4	0
Sports	2	0
Audience Participation & Games	16	4
Specials	1	0
Others	0	0
Others	100	100

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[350] *See* Hall & Batlivala, *supra* note 309, at 409.

[351] *See* text accompanying note 335 *supra*.

[352] This does not mean that the preceding analysis is invalid. It was based on the assumption that program quality, as measured by cost, was a constant. Since first-run syndicated programming will be of significantly lower quality, it is not surprising that the resultant programming will consist of different program types. However, within the category of first-run syndicated programming, stations will select programs which maximize audiences.

[353] 1969 LITTLE REPORT, *supra* note 50, at 72-75 (Table 34) (first run syndication); TELEVI-

An analysis of Table 7 reveals a wide disparity in program type between network schedules and first-run syndicated programming. Networks devoted 84 percent of their prime-time schedule to four programming categories (adventure, science fiction, and drama; mystery and police; westerns; and comedy) while only 2 percent of first-run syndicated programming consisted of such programming. Furthermore, 55 percent of first-run syndicated programming exhibited in 1968 consisted of interview and talk shows and audience participation and game programs, while only 4 percent of network programming was devoted to such programs.

In sum, if first-run syndicated programming under the prime-time access rule continues to consist largely of the inexpensive program types that predominated prior to the adoption of the rule, the rule will result in an increase in program diversity during prime time by replacing network drama, mystery, and comedy programs with cheap game and talk shows—hardly the result envisioned by the Commission.

The Proposed Rule

Since the prime-time access rule will not achieve the goals set for it by the Commission, it is appropriate to ask whether the proposed rule would have done so. Under the proposed rule, fourteen hours of network prime-time programming per week would have to be licensed to non-network entities who would then acquire time from the networks for the exhibition of the program. The most obvious question that occurs in an attempt to analyze the proposed rule is why the Commission looked to advertiser-licensed programming as a means of increasing diversity after both the staff and the Commission itself had concluded that such programming had virtually disappeared for economic reasons. The first answer to this question is that the Commission was never comfortable with the conclusion that the networks were merely passive beneficiaries of economically induced changes in national advertising practices.[354] Despite the fact that no evidence was found which conclusively demonstrated that the switch to producer-licensed programming had been engineered by the networks in order to give them almost complete control over network programming, the Commission noted that the switch occurred in part because of the significant increase in the use of hour-

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sion Magazine, May, 1968, at 22-25 (networks). Movies and news programs were excluded. Hour-long programs were counted as two half-hour programs.

[354] PTAR I, *supra* note 41, at 408-09. "[T]he record leaves considerable doubt as to who was responsible for the change in program control and sponsorship patterns." *Id.* at 408.

long programs and cited the testimony of witnesses who alleged that the networks were responsible for this change.[355]

The Commission also concluded that if the rule had been adopted, advertisers would have found different methods of program procurement rather than abandon television network advertising.[356] According to data in the 1966 Little Report, however, in 1964 network time charges[357] and the cost of a half-hour or hour-long series "exceeded the budgets of nearly 88 percent of the advertisers."[358] However, the Commission indicated that there were other ways in which the networks could comply with the proposed rule. It noted that network time might be acquired by *producers*, who could then sell commercial time directly to advertisers,[359] that networks could assist in obtaining advertising support for such programming, and that networks could award cost-justified discounts to advertisers who cooperated with independent producers in supplying independent programs.[360]

If the proposed rule had been adopted, it is clear that the adjustments necessary to maintain a full schedule of prime-time, network programming would have been made and that the networks would not have reduced their prime-time programming to fourteen hours per week. If advertisers proved to be unable or unwilling to purchase hour-long programs, undoubtedly shorter programs would be offered. If advertisers still failed to purchase the time protected from network encroachment, new categories of program brokers would undoubtedly have arisen to fill the void.

One of the most serious problems with the prime-time access rule is that, because of its reliance on non-network programming, the quality of the resultant access programming will be significantly lower than that of the network programming it replaces. The proposed rule, however, was designed to increase diversity in *network* programming by limiting the amount of prime-time programming in which networks could have ownership interests. As a result, the programming which would have been engendered by the rule would not have suffered the cost and revenue disadvantages that face first-run syndicated programming under the prime-time access rule because the proposed rule would preserve the network affiliate relationship and the substantial economies of scale inherent in network program distribution. Although the proposed fifty-percent rule would have avoided the quality problems of the prime-time access rule, it would not have achieved the Commission's diversity goals. Certainly, had the proposed rule been adopted, it would have resulted in an increase in the number of entities creatively controlling prime-time programming since programming creatively controlled by the three networks would be limited to fourteen hours per week.[361] However, the Commission's assumption that this increase in the diversity of program sources would also result in significant increases in the diversity of network programming was unwarranted. As indicated in the analysis of the prime-time access rule, transferring the program selection function to non-network sources will result in an increase in the diversity of quality, prime-time programming only if the new program sources make programming decisions differently than networks. Since there is no reason to believe that advertisers or producers would not attempt to maximize audiences, there is little reason to believe that the proposed rule would have had a significant effect on program diversity.

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[355] *See* note 61 *supra*.

[356] PTAR I, *supra* note 41, at 409.

[357] Prior to the change from advertiser-licensed to network-licensed programs, network advertising rates were based on time and program charges. Time charges were equal to the sum of the rates of all stations affiliated with the network. Program charges reflected the production costs of the program in question and were charged only when the network produced the program or licensed it from a producer. However, since the almost complete switch to producer-licensed network programs, there is no longer any relationship between advertising revenues received by the networks and the compensation paid to affiliates. *See* note 72 *supra*. For a discussion of the advertiser-licensed network program process, see Salant, Fisher, & Brooks, *supra* note 32, at 590-93.

[358] II 1966 LITTLE REPORT, *supra* note 67, at 64. In 1969, only 6.9% of network program hours were sponsored by one or two advertisers. 1969 LITTLE REPORT, *supra* note 50, at 17-20 (Table 8).

[359] This would necessitate a basic change in network policy of selling time only to advertisers. *See* Proposed Rulemaking, *supra* note 8, at 2150; PTAR I, *supra* note 41, at 410.

[360] PTAR I, *supra* note 41, at 410.

It is clear from the staff report and the Commission proceedings that the Commission believed that there were a substantial number of advertisers who wanted to sponsor high quality, prime-time programming which was not designed to attract the maximum audience and that these advertisers were willing to pay higher costs per thousand viewers in order to do so.[362] While this may have been true in the early 1950's, it is very unlikely that advertisers would be willing to do so in the 1970's. The Commission's assumption that advertisers are still willing to sponsor programming which will appeal to less than a maximal audience ignores economic reality.[363] Crandall refers to the Commission's view as an "illusion about the willingness of advertisers to commit resources to inefficient promotion and [to] a rather romantic and nostalgic view of times past."[364] He points out that the Commission's assumption that high quality advertiser-licensed programming disappeared because advertisers were unable to obtain network time for it was illogical since advertisers have failed to make this demand felt in producer-licensed programs by a willingness to pay significantly higher rates for commercial time on such specialized programming.[365] According to Crandall, the real reason for the disappearance of such programming lies in the tremendous increase in the opportunity cost of television time,[366] and this, coupled with substantial increases in program costs, "makes philanthropy a very costly policy for an advertiser on today's network television."[367]

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[361] In view of the fact that the networks only offer schedules during 3.5 hours of prime time per day, the proposed rule would have required networks to obtain 10.5 hours a week of programming which was neither producer-licensed nor network produced. Since 3.8% of network prime-time schedules in 1968 consisted of advertiser-licensed programming, the networks would have had to acquire an additional 9.57 hours per week of either advertiser-licensed programming or programming based on some new form of licensing arrangement to replace a similar amount of programming in which networks owned the first-run exhibition rights.

[362] PTAR I, *supra* note 41, at 391.

Thus, in view of the fact that, like the prime-time access rule, the proposed rule will not alter the basis for program selection, there is no reason to believe that the proposed rule would have had any effect on program diversity.[368]

The Financial Interest Rule

The adoption of the financial interest rule was designed to curb two practices which the Commission concluded were detrimental to the public interest. First, the rule was intended to prevent networks from acquiring subsequent rights in programs licensed from producers in order to enhance "the producer's ability profitably to operate in network television . . . ."[369] Second, the rule was adopted to prohibit a conflict of interest which, according to the Commission, resulted in the selection for network exhibition of only those programs in which networks had acquired subsequent rights.[370]

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[363] *See id.* at 403. *See also* discussion in text accompanying notes 234-39 *supra*. Opponents of the proposed rule argued that there was insufficient diversity of marketing interest to support a significant amount of network programming more diverse than presently offered. PTAR I, *supra* note 41, at 403.

[364] Crandall, *supra* note 70, at 394.

[365] *Id.* The increased rates would result from the advertiser paying the same gross amount for a low-rated program as the networks could expect to receive by substituting a high-rated program. In addition, the advertiser would have to compensate the network for any adverse adjacency effect unless the advertiser-licensed low-rated program was scheduled at the end of the network's prime-time schedule. *See* Barrow, *supra* note 299, at 638.

[366] Crandall notes that in 1953 only 50% of the nation's homes had television sets while this increased to more than 95% by 1968. Crandall, *supra* note 70, at 395.

[367] *Id.*

[368] It should also be noted that the proposed rule would actually result in less diversity than the prime-time access rule since there would be no influx of new, "diverse" game and talk shows.

[369] PTAR I, *supra* note 41, at 398. *See* Proposed Rulemaking, *supra* note 8, at 2150, 2154.

With respect to the enhancement of producer profitability, the rule makes no sense whatsoever since it erroneously assumes that the license fees paid by the networks will remain the same even though the networks are prevented from acquiring valuable subsequent rights in such programming. In view of the fact that the rule will neither reduce the networks' bargaining power vis-à-vis producers nor diminish the level of competition among producers, it is obvious that prohibiting networks from acquiring subsequent rights in programs licensed from producers will simply result either in a concomitant decrease in the amount networks are willing to pay for the network exhibition rights alone,[371] or in lower prices asked by producers in response to competitive pressures.[372] In fact, prohibiting producers from selling a portion of their subsequent rights to networks at the time networks acquire the first-run license will *impair* the economic position of producers since the decrease in the fee obtained from networks will increase the size of any production deficits and because the time lag between program production and receipt of revenues from domestic syndication will be substantially increased.[373] Furthermore, the rule will also require producers to absorb the entire risk of syndication failure.[374] At the time a series is sold to the networks, it is very difficult to predict whether or not the series will remain on the network long enough to have any syndication value. Prior to the adoption of the financial interest rule, producers were able to sell a portion of this risk to the networks by "selling" a portion of their syndication profits to the networks in

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Crandall characterizes the rule as an attempt by the Commission to protect producers from network monopsony power. Crandall, *supra* note 201, at 491.

[370] PTAR I, *supra* note 41, at 399.

[371] *See* Crandall, *supra* note 70, at 400.

[372] In other words the result will be the same regardless of whether network license fees are a function of network oligopsonistic power or competitive pressures in the program production industry. *See* text accompanying notes 273-84 *supra*. There was testimony during the program inquiry to the effect that subsequent rights in producer-licensed programming were *purchased* by the networks. One NBC executive testified that "[w]e have yet to pay a price which represents only an allocation of the value of the program limited to its network exhibition." SECOND INTERIM REPORT, PART II, *supra* note 1, at 268. *See also* SECOND INTERIM REPORT, PART I, *supra* note 1, at 68-69.

[373] Foreign syndication may take place concurrently with the network run, but, under the terms of the pilot agreement, a program may not be released for domestic syndication until after the network run ends.

[374] Crandall, *supra* note 70, at 399 n.35.

conjunction with the sale of the network exhibition rights.[375]

Some commentators have rejected the argument that networks will simply lower prices paid producers. In their view, producers have sufficient bargaining power to enable them to capture a share of the excess profits generated by network broadcasting.[376] As was noted earlier, however, there are serious problems with the conclusion that producers were able to capture part of these excess profits.[377] Furthermore, even if producers possessed sufficient bargaining power to enable them to capture some of the excess profits prior to the rule, there is no reason to expect that the adoption of the financial interest rule will enable them to capture an *increased* share of these profits, since there is no evidence that the rule will increase their bargaining power.[378]

In fact, there is good reason to believe that producers' bargaining power vis-a-vis the networks will be diminished as a result of the financial interest and prime-time access rules. As was noted earlier, the financial interest rule will adversely affect the economic position of many producers, while the prime-time access rule will decrease demand for network programming by reducing the amount of prime-time network programming by 14 percent.

The Commission also concluded that the networks had a "clear conflict of interest" in choosing producer-licensed programs for network exhibition since it found that their choice was greatly influenced by the existence or nonexistence of subsequent rights in such programming.[379] Although the Commission focused on "new, untried," "packager-licensed" programs,[380] it also concluded that the problem existed generally: "The overall result is that, save for about 6 or 7 percent of their schedules which were the result of direct dealing between independent producers and sponsors, networks accepted virtually no entertainment program for network exhibition in a 5-

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[375] *See* Commissioner Robinson's dissent to PTAR III, *supra* note 6, at 890 n.3.

[376] R. NOLL, *supra* note 201, at 83.

[377] *See* text accompanying notes 273-96 *supra*.

[378] If networks are unable to reduce the price they pay producers despite the fact that they are prohibited from acquiring subsequent rights, the revenues producers receive from commercial exploitation of a given program will increase by the amount attributable to the value of the subsequent rights previously acquired by the networks and network revenue will decline by a similar amount.

[379] PTAR I, *supra* note 41, at 398, Proposed Rulemaking, *supra* note 8, at 2157.

[380] PTAR I, *supra* note 41, at 393 n.30. Between 1960 and 1964 the Commission found that networks acquired distribution rights in 37.6% and syndication profit shares in 81.4% of new programming licensed to them from producers. *Id.* at n.29. Since no similar data was contained in the 1969 LITTLE REPORT, the Commission noted that "it may reasonably be inferred that the same conditions continue . . . ." *Id.*

year period in which they did not have financial interests . . . ."[381]

The first problem with this conclusion is that it is based on a false premise. Not only did networks accept producer-licensed programs in which they had no subsequent interest, they accepted a substantial number of such programs.[382] Despite the fact that the Commission suggests that the networks accepted virtually no such programming between 1960 and 1964, the Little Report indicates that during this period 28 percent of producer-licensed network programming consisted of programs in which the networks had no subsequent rights whatsoever.[383]

Furthermore, there is statistical evidence that networks do not favor programs in which they have subsequent rights. Crandall examined all prime-time series which were scheduled for the November composite week in the years 1960 to 1965 to determine whether or not the existence of network subsequent rights was a factor in network decisions to retain or cancel existing network programs.[384] He found that programs in which networks had acquired subsequent rights were not more likely to be retained but were more likely to be cancelled than series in which the networks had no such rights.[385]

The Network Syndication Rule

Although the financial interest rule would prohibit networks from acquiring distribution rights from others, it would not prohibit them from engaging in the distribution of network-produced programs. The network syndication rule, however, prohibits networks from engaging in the domestic distribution of network-produced programming but permits networks to distribute such programs in foreign markets.[386] The Commission's decision to prohibit networks from engaging in syndication was made in part because of its concern with the potential conflict of interest in the network program selection process which led to the adoption of the financial interest rule[387] and in part because of its concern for competition in the syndication market.[388]

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[381] *Id.* at 393.

[382] The Commission recognized that there was a decrease in network acquisition of subsequent rights after 1964 but noted that "the practice continues." *Id.* at 393 n.31.

[383] 1969 LITTLE REPORT, *supra* note 50, at 57 (Table 26). During the period from 1957 to 1968, inclusive, networks obtained no subsequent rights in 30% of producer-licensed programming. *Id.* It is also significant to note that between 1960 and 1964, the networks *rejected* 37 pilots in which they had acquired distribution rights and 75 pilots in which they had acquired profit shares. PTAR I, *supra* note 41, at 393 n.30. *See* 1966 LITTLE REPORT, *supra* note 67, at 53.

[384] Crandall, *supra* note 70, at 405-06.

[385] *Id.* This is to be expected, according to Crandall, in view of the fact the networks payed higher prices for programs in which they acquired subsequent rights:

> A program of average success on the network and in which the network has syndication interests is not likely to be more attractive than another program of equal success in which the network has no interests because the former's cost per episode shown on the network is likely to be higher than that of the latter. Indeed, the above results show that in some instances ownership of the syndication right may upon occasion increase the chance of a program's rejection. The Commission's theory of supplier exploitation simply is not supported by the evidence.

Id. at 406.

While the Commission did not contend that the syndication market was dominated by the networks, it did find that network revenues from syndication were "substantial and . . . increasing"[389] and that the rule was necessary in order to prevent potential network domination of the syndication market.[390] The Commission's analysis of network market power in the syndication market was incorrect. The fact that network sales in the syndication market increased from $5.4 million in 1957 to $26.1 million in 1967[391] is not an indication of network power in this market since it does not involve a comparison of network sales with total industry sales. Furthermore, these figures represent network sales of off-network programming alone and thus do not take into consideration sales of feature films and first-run syndicated programs which accounted for 69 percent of total domestic syndication sales in 1967.[392] If all three syndication markets are examined, it is clear that network market power was relatively small in

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[386] 47 C.F.R. § 73.658(j)(i) (1976).

[387] *See* note 180 *supra*. The Commission also indicated that the network syndication rule was adopted to prevent a "potential" conflict of interest arising from the fact that networks were engaged in distributing off-network series to independent stations in competition with their own programming which was exhibited on their affiliated stations in the same market. PTAR I, *supra* note 41, at 394.

[388] *See* note 180 *supra*.

[389] PTAR I, *supra* note 41, at 392.

[390] One of the reasons for the Commission's concern for potential network dominance was the networks' competitive advantage over independent syndicators resulting from the long-term relationship between networks and their affiliates. *Id.* at 398; Proposed Rulemaking, *supra* note 8, at 2159. While the Commission did not elaborate, presumably it was referring to the possibility that networks would use the threat of disaffiliation to coerce affiliates into purchasing off-network programming from them as opposed to other syndicators, although the Commission indicated that there was no evidence that the networks were then attempting to secure syndication sales in this manner. Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C.2d 318, 331 (1970). In 1959, similar conclusions concerning the networks' representation of affiliated stations in the spot sales market prompted the Commission to adopt a rule prohibiting networks from representing any station other than those owned by a network, in the sale of spot time. 47 C.F.R. § 73.658(i) (1976). *See* Report and Order, 27 F.C.C. 697 (1959), *aff'd*, Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

[391] PTAR I, *supra* note 41, at 393.

[392] Derived from 1969 LITTLE REPORT, *supra* note 50, at 108-09 (Table 45). These data refer to sales in all markets and are not limited to the top 50 markets.

1967 and that it had been declining rapidly. The network share of industry sales in the general syndication market, consisting of sales of feature films, off-network and first-run syndicated programming to local stations, decreased substantially from 23 percent in 1957 to 8 percent in 1967.[393] The network share of industry sales in the television series syndication market, consisting of off-network and first-run syndicated programs, also declined substantially from 51.2 percent in 1957 to 18.7 percent in 1967.[394] Finally, even if the sale of off-network programming alone is considered as a separate market, the network share of industry sales in such market decreased more substantially than in either of the two other syndication markets—from 61.4 percent in 1957 to 22 percent in 1967.[395] In view of these declining network market shares, it is not surprising that economists have concluded that the television series syndication market was reasonably competitive.[396]

CONCLUSION

In an effort to decrease network dominance and enhance the profitability of independent producers, the Commission interfered with the normal market forces in the network television broadcasting industry. The Commission concluded that such interference was necessary because the concentration of economic and creative control in the industry was depriving the viewing public of diverse and antagonistic sources of prime-time television programming. It has been the position of this paper that, by confusing economic and creative control and by failing to measure the extent of network power in the relevant markets, the Commission's evaluation of the concentration of economic power was erroneous. A careful analysis of these markets reveals that, while networks economically controlled the network exhibition market, it is clear that they had not achieved total domination of either the nonnetwork or general program exhibition markets. Furthermore, the Commission's conclusion that networks were asserting oligopsonistic power in the network program market was unsupported by the evidence. The ability of networks to assert *any* oligopsonistic power in this market is highly questionable given the high level of competition in the network program procurement industry.

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[393] *Id.*

[394] *Id.*

[395] *Id.*

[396] R. NOLL, *supra* note 201, at 75. Owen, Beebe, and Manning noted that "several syndicators survived with only 3 to 6 percent of the market" and concluded "that competitive forces are quite strong in the market for syndicated programs." B. OWEN, *supra* note 201, at 34-35. *See also* Crandall, *supra* note 70, at 399.

The Commission's analysis of the concentration of creative control is on firmer ground, although network control over programming in the nonnetwork exhibition market was found to be miniscule. However, the Commission's "solution" to the problem of concentration of creative control was doomed from the outset, since economic factors will preclude an increase in the diversity of "high quality," prime-time programming. Any increase in diversity will be the result of an influx of cheap game and talk shows at the expense of high quality network programming.

Similarly, the Commission's attempt to protect producers from the "rapacious" tendencies of networks by the adoption of the financial interest rule will not benefit producers. In fact it will probably economically harm those it seeks to protect by not only prohibiting producers from selling part of their syndication risk to networks, but also by significantly prolonging the delay between incurrence of production costs and the receipt of syndication revenues, thereby increasing any existing production deficits. Network dominance, as measured solely by the number of prime-time hours economically controlled by the networks, will decrease as the result of the prime-time access rule. At the same time, network bargaining power vis-a-vis producers of network programming will increase as the result of a significant decrease in demand for such programming mandated by the rule. Further, the new "access period" will not be free of network influence. By virtue of their ownership of fifteen VHF stations in the largest markets in the country, networks will be in a position to greatly influence the selection of access programming.[397]

In view of these results, the Commission would have been wiser to follow its own admonition, expounded in the recent rerun inquiry, that "it appears to us to be wiser to permit these essentially economic relationships to be worked out in the open market than to subject them to governmental control."[398] The Commission attempted to regulate the "essential economic relationships" in the program procurement process and failed. Its failure was, however, not unpredictable, for as Chairman Burch noted in his perceptive dissent to the adoption of the rules, "unfortunately, the Commission, despite its plenary power to regulate, cannot so easily regulate the laws of economics."[399]

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[397] Pearce notes that "[w]ithout a sale to a network O & O [owned and operated] group, worth between $20,000 and $30,000 per episode, it is very difficult to make money with a syndicated series," and, as a result, "the fate of the first-run syndication business depends, indirectly, on the networks, since there is assumed to be some degree of network relationship to the owned and operated station groups." A. PEARCE, *supra* note 85, at 126. The question of network dominance via their owned and operated stations will be treated at length in the forthcoming article. *See* note 5 *supra*.

[398] 61 F.C.C.2d 946, 947 (1976).

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[399] PTAR I, *supra* note 41, at 413.

A rewrite of the communications law has sparked debate that may undo the FCC's protection of TV station monopolies.

DECIDING TV's FUTURE*

BY IDA WALTERS

LAST JUNE, THE HOUSE Communications Subcommittee released its draft of a new law revamping the entire Communications Act of 1934, and subcommittee chairman Lionel Van Deerlin (D.-Calif.) is shooting for passage by the House in 1979 and a completed bill ready for the President's signature before the end of 1980. The proposed law would in its present form, among other things, free cable TV from federal regulation, allow telephone companies to enter the cable field, virtually deregulate radio, lessen regulation of TV, make the duration of broadcast licenses indefinite, and levy fees for use of airwave frequencies.

The bill also purposely deletes the present requirement that regulation of broadcasting be "in the public interest" and would instead permit regulation only "to the extent that marketplace forces are deficient." Either phrase is no doubt intrinsically meaningless, but swapping the one for the other will significantly affect administrative and judicial interpretation. The new language makes competition rather than regulation the norm in elucidating the aims of the legislation. Instead of the Federal Communications Commission there would be a Communications Regulatory Commission, with five members rather than the seven now appointed.

The bill recognizes some of the vast shortcomings of the current FCC-run system and without fundamentally challenging it, attempts to modify it. To this end it would tax away the monopoly profits created by the FCC's allocation plan for TV channels, by levying frequency-use fees on broadcasters. These fees would be based on the frequency's worth as determined by its scarcity value. In other words, fees are highest for the network-owned stations and the most profitable network affiliates. These fees are expected to yield more than $250 million annually and would be used to support public-broadcast programming, minority ownership of stations, and rural telecommunications, as well as pay the costs of broadcast regulation.

The authority to determine the uses to which broadcast frequencies are put, would be transferred to the National Telecommunications and Information Administration. NTIA would also be given a new name and become an executive branch agency outside the cabinet departments. Nevertheless, Henry Geller, chairman of NTIA and former FCC counsel, complained at the hearings on the bill this fall that the proposed law gives his agency only "primary" authority to allocate uses of frequencies. (Once upon a time, NTIA was the White House Office of Telecommunications Policy, which Carter's first reorganization made a brand new, 280-person addition to the Commerce Department.) Geller advised that the word "primary" be deleted. He also argued that NTIA should be granted the authority to set national communications policy.

Geller's critics, especially broadcasters, argue that if he gets his way the White House could use NTIA's power to punish or get rid of unfriendly TV stations. Geller replies that such fear is "unfounded" since the agency would be independent. His claims, however, ignore political realities.

Former FCC commissioner Nicholas Johnson, now at the helm of the National Citizens Communications Lobby, is appalled by the proposed bill because it will "deed television licenses to the current operators in perpetuity," thereby allowing the poisoning and contamination of the airwaves (his metaphor).

The Carter administration has yet to voice an official opinion on the proposed new communications law. This may well be an attempt to avoid the kind of political embarrassment suffered by President Ford who, after initially pursuing cable reform, totally capitulated to pressures from the networks to drop it.

Now that deregulation of cable television—and communication reform—is possible, how have the networks and other politically powerful broadcasters responded? A recent report of the National Association of Broadcasters (NAB) denounces cable, saying it will "transmit borderline pornography, deceptive and irresponsible advertising, subversive propaganda, the outpourings of the lunatic fringe and the appeals of countless others whose appearances have thus far been minimized by broadcasters' responsibility to program in the public interest."

The NAB produced research "proving" that the market for nonbroadcast fare is minuscule, and then claimed that allowing cable firms to cater to it would "destroy the greatest communications system in the world." The NAB has pounded away at the high price of cable service, cable's ability to cater to highbrow minority tastes, and even a supposed danger of social divisiveness, charging that "fractionalizing the 'shared' television screen would heighten the cultural tendency toward disunity and disorganization."

The cable industry, which has always fought FCC restrictions on its expansion, now wants to be federally regulated; that is, it wants protection from restrictions that state and local governments might impose on it, and

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also protection from "the largest monopoly in the world—the telephone company," which has a network of wires already in place that could be used for cable TV. Robert Schmidt, chairman of the National Cable TV Association, stated at the hearings: "It strains credulity to assume that a communications service [that reaches one in five households] would be ignored by the federal communications agency." This led a naive subcommittee member, Representative W. Henson Moore (R.-La.), to declare he thought it was "unbelievable that an industry would refuse Congress's offer to deregulate it."

Representative Van Deerlin, the bill's chief sponsor, said he might be willing to include regulation of cable TV in his next draft, and also to limit the telephone company's provision of cable service to rural areas where other cable companies cannot profitably build systems. By the end of the first round of hearings, Van Deerlin had indicated that there wasn't a single provision in the draft on which he wouldn't compromise—"if it would help the bill to eventually pass."

In short, it's anybody's guess where this proposed bill is going. A Washington lawyer recently told David Burnham of the *New York Times* that though the odds on passage were much better than they would have been two years ago, they are still 10 to 1 against passage. The Senate's version of a communications law may be ready later this year.

One way or another, cable systems are likely to expand, with pay cable in the competition for viewers. If it begins to look as if broadcasting profits will be significantly diminished, however, there will be pressure to do one of two things: deregulate TV broadcasting so it can better compete by expanding its programming to meet more viewer demands, or heavily regulate broadcasting's competitors.

The decision will not be easy. In the past the commission has chosen to restrict competition. Now, however, such anticompetitive regulation is under heavy attack, and the FCC has been forced to retreat. It appears that only legislation that provides the FCC with clear authority over not just broadcasting, but all technologies that deliver video programming to the home, will be required to enable the FCC to exercise the kind of power it previously exerted.

Such power naturally appeals to legislators, regulators, and other interest groups angling for some control over electronic mass communications media. But since the "scarcity" argument used in the case of broadcast frequencies cannot be used to justify regulating cable systems, or direct-to-home transmissions from satellites, such comprehensive regulatory legislation will be difficult to pass.

AT PRESENT, TELEVISION viewers are constantly mocked by the numerous silent channels they must flip past in their search for something to watch. Eager for greater choice and variety, they may wonder why TV is limited to so few channels and why these offer fare that is so similar. The explanation is astonishingly simple: The Federal Communications Commission planned it that way.

In the 1940s, 12 frequencies in the VHF (very high frequency) broadcast band of the electromagnetic spectrum were set aside for television signals. The FCC carved up the country into dozens of adjoining "communities" and allocated to each a few airwave frequencies. To prevent interference, the transmitting power of each station was limited so that no broadcast signal could extend beyond the geographical boundaries drawn by the FCC.

The FCC's plan limits viewing choices to a fraction of what is technically possible, since 12 national stations could fill the entire VHF channel capacity with programming. With 12 choices, each able to draw upon the entire country for its audience, it would become profitable to appeal to other than the lowest mass taste.

The allocation plan affects station profits in at least two ways. On the one hand it protects them by limiting the number of competing broadcast signals in an area. On the other hand, the FCC's plan ties a station's prosperity to the number of homes its signal can reach because broadcast profits are derived from advertising revenues, which are based solely on the number of viewers a station's programming attracts. The plan, therefore, delayed the introduction of TV to thinly populated areas for years, even decades, and created superrich stations in densely populated allocation areas together with marginally profitable ones in less populated areas.

Dismantling this structure is likely to prove difficult, in part because of entrenched support for government policies dictating that broadcast stations be locally oriented. Armed with the authority to act in the name of the "public interest, convenience, and necessity," the FCC has always insisted that TV (and radio) stations should originate programs specifically directed toward the area in which they are located. This policy, quite appropriately, is known as "localism." Politicians in the meantime have not failed to notice that local stations roughly match electoral districts and provide a forum for reaching voters, while access for and favorable coverage of political figures may often depend on how well broadcasters' interests are protected.

Localism was imposed on television, as it had been on radio, through the frequency allocation plan. It was further enforced by requiring stations to provide a certain amount of news, public affairs, and other locally oriented programming as a condition of licensing. Except for news, which is produced profitably by most stations, such programming is very costly to present, since it generally attracts so few viewers that advertisers won't support it.

Lest anyone imagine that the localism doctrine is merely a Jeffersonian impulse toward independence and autonomy that has gone slightly awry, the frank discussion of the FCC's role in a 1958 staff report of the Senate Commerce Committee makes clear that this is a centralized plan that is being applied locally:

> The initial choice of the type of service to be proposed for a given community should, of course, be left to its citizens or to entrepreneurs who are willing to undertake to install the facilities necessary to bring television to the area. However, if we are to have an orderly development of our communications system, the final determination of the type of service best fitted to the particular circumstances should be left to a centralized agency, which must mean the Commission.

The Nixon administration had its own variety of localism. Nixon's broadcast reform proposal sought to put the onus for any controversial network programs on local stations at license renewal time. Fearful local stations, the White House hoped, would then reject network programs that might offend some local pressure group. In a sense, the Nixon strategy was a version of the Burger Court's "community standards" criterion for obscenity — applied in this case through the regulatory process to put limits on the political content of broadcasting.

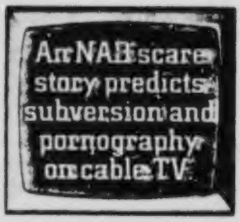
To achieve localism, the FCC has been willing to defy consumer preferences and the economies of broadcasting, as well as to inhibit the full development of television and, of course, of all competition to it. In other words, the FCC has deliberately prevented television from evolving naturally into national and regional stations that would have filled up the channels with diversified programming.

The FCC's present pattern of allocations was drawn in 1952, when the commission, realizing that programming supplied by the three networks (via microwave and telephone lines) was undermining its plan for localism, allocated hundreds of additional stations. It did this on the same basis as its earlier allocations, a few to a community—but this time it defined more communities. These allocations involved breaking up the 70 frequencies in the UHF (ultra high frequency) broadcast band. The UHF stations allocated to the larger cities, and those few that became network affiliates, have fared reasonably well. The great majority, however, are marginal operations.

Because of frequency differences, UHF signals are not as well received on the average set as VHF signals. More transmitting power and relay transmitters would remedy this, but that would violate the promise that these stations would be even more "local" than VHF stations. In addition, UHF stations cannot afford to compete with the national programs offered by network affiliates in their market, and they could never afford to operate in markets that did not support network affiliates. Also, the UHF stations have been even less successful than VHF stations in providing locally oriented programs. It is obvious, even to the FCC, that this requirement is beyond the discretionary revenues of most of them.

At any rate, the entire scheme overlooked the possibility that television broadcasters might one day encounter competition from other technologies that could supply viewing alternatives for the home video set. Since the FCC had saddled local stations with unprofitable programming and kept them from expanding beyond their allocation areas, broadcasters inevitably appealed to the commission for protection when competition emerged.

In an effort to preserve the status quo, the FCC and the broadcasters put forth the claim that competition would sink 50 percent of all television stations. They have contended that this would rob millions of viewers of "free" entertainment and local programs, and would reduce the overall quality of such programs—assuming a direct correlation between quality and budget—since programming costs would be spread over a smaller audience. In the name of its commitment to the "public interest, convenience and necessity" the FCC rejected, strangled, shackled, and in every other way restricted potential rivals.


An NAB scare story predicts subversion and pornography on cable TV.

In the case of cable TV, which posed the greatest challenge to the FCC's plan and to the stations created by it, these restrictions, in effect for more than fifteen years, eventually were seen as unreasonable—even by the courts and some members of Congress who had previously supported protection of TV broadcasting.

DURING THE 1950S, PAY broadcasting was introduced. This is over-the-air subscription TV where a specially scrambled signal is sent out and subscribers pay by the month, or directly into a box attached to the set, to have the signals unscrambled. The FCC immediately restricted pay broadcasting so that its programming would not compete with commercial TV. Pay TV faded, but reemerged recently when freed by the courts along with pay cable in late 1977.

Technological advances in frequency use since 1952 have made it possible to use the VHF band for more than 12 channels, yet all applications to broadcast on these additional frequencies have also been rejected. Again, the FCC successfully argued that it was in the public interest to protect established TV broadcasters' ability to provide local programming. Today, only 30 percent of television homes receive a UHF station—and even this is thanks in part to cable systems that put reception of UHF signals on a par with VHF reception.

Ironically, the FCC's allocation plan, barring TV reception in millions of homes, actually spawned the cable industry. In the late 1940s, cable companies rushed in to fill the artificial gaps that had been created in the market. They began by building tall "community antennas" to pick up an area's broadcast signals, then ran these through cable to subscribers at the fringe of the broadcast area where reception was poor, and beyond, where no reception was possible. Later, to attract more subscribers, cable systems "imported" signals from distant markets (via microwave).

Broadcasters complained, but the FCC in 1959 refused a congressional nudge to regulate the cable industry, on the ground that it had no jurisdiction. In truth, it did not think the administrative effort justified; it expected cable systems to disappear as its plan for spreading communications succeeded. When this hadn't happened by 1965, the commission virtually froze cable television.

"The Federal Communications Commission backed into regulation of cable [in 1965] . . . because of its potential negative impact on conventional broadcasting," noted a January 1976 report of the House Communications Subcommittee.

Lee Loevinger, a commissioner at the time, raised an angry voice in 1965 against what the FCC was doing. He said:

> We are going to set up . . . little, local marginal stations [in every hamlet and crossroads town] that might not exist otherwise, but . . . we are going to have a system which is dependent upon the favor of Government for its continued existence . . . [The FCC] has made its allocations, . . . but if the market does not use them, we will institute measures to see that the market has got to use them one way or another. We will do this by denying them every other outlet but the one that we favor.

Through its power over microwave common carriers, the FCC halted further imported signals and refused to license cable companies to build their own microwave facilities. Still later, when cable systems could receive programming from satellites for their pay cable channels, the FCC prohibited them from competing with TV for most premium programming, and required them to construct $100,000 earth receiving stations when $20,000 facilities would have sufficed. The restrictions on imported programming and on pay cable left the cable industry with little to offer in areas where there were numerous broadcast signals and where reception was good.

Furthermore, as dissenting Commissioner Loevinger pointed out at the time, these restrictions on programming limited "the choice of the public," interfered with the workings of the economy, and intruded "into the area of free speech."

Even with all the obstacles placed in its path, cable was to many a medium of considerable potential. During the late 1960s and early 1970s, the telephone company tried to enter the cable field, but was prohibited. The networks, too, were barred from owning cable operations, but that didn't stop them from producing programming for cable. Eventually that too was prohibited, on the familiar ground that it might rob free TV of the programs needed to keep large audiences and the revenues that facilitate localism.

As far as the FCC was concerned, cable TV was to have no negative impact on broadcast TV. By 1972, however, the FCC could no longer justify the freeze: TV could not point to any grave harm attributable to cable systems established prior to 1965 that were carrying imported programming. The commission lifted the freeze, replacing it with enough restrictions to make cable, in its own words, a "supplement to TV"—not a rival.

Naturally, the FCC saddled cable systems with localism, requiring large new systems to provide three public access channels (later upped to four) —essentially free of charge—plus the equipment, facilities, and personnel to run them. But a federal appeals court in 1978 ruled that Congress had not given the FCC the authority to impose such requirements. Furthermore, the court held that even if Congress had done so, such powers would probably be unconstitutional as violations of the First Amendment's free-speech guarantees and the Fifth Amendment's strictures against uncompensated taking of property. At the request of the FCC, the American Civil Liberties Union, and various other lobbying groups that favor compulsory access rules, the High Court agreed to review that decision. It may rule, probably before a new communications act can be passed, on whether cable is to be treated like broadcasting or like newspapers—which the Court has said have a First Amendment right to be free of compulsory access laws.

Developments in the courts have also affected the destiny of pay cable. Since the 1977 court decision lifting past restrictions on programming, pay cable has greatly diversified. The new cable systems have numerous "per program" pay cable channels where more specialized programming at varying prices can be "ordered" and computer-billed monthly. For example, one pay cable system recently offered the La Scala production of *Cavalleria Rusticana* for $2.50. With no technical limitation on the number of cable channels that can be offered, and the market as the sole limit on what types of programming can be presented on them, cable producers can more efficiently match production expenses to viewer interests. Cable audiences, by their spending patterns, can make their preferences known, and satellites, transmitting to a number of cable systems, can gather these audiences, even though they are relatively small.

IT IS EASY TO ACCUSE THE FCC in its anticable efforts of blindly equating the fate of the broadcasting industry with the public interest, but this misses the larger point: The FCC was compelled to restrict, deny, and reject broadcasting's competitors in order to protect broadcasters' and the government's interests, not the public's as it claimed. Any significant threat to broadcasting's role as the dominant programmer of the home video set would also be a direct threat to the allocation plan, to localism, and to the government's role in broadcasting. As dissenting Commissioner Loevinger pointed out in 1965, restrictions on cable programming were "based explicitly on the premise . . . that the FCC will continue to require local stations to present local live programs and will supervise these programs." The protection offered to local stations by these restrictions on cable, Loevinger added, "simply gives the FCC another ground for asserting the right to supervise the programming of local stations." In other words, the FCC's system built around its allocation plan is a seamless web, and the FCC itself could see that modifications threaten to unravel the whole thing.

> TV's rivals were rejected, shackled, and restricted in every way.

Yet with a competitor like cable, and with video cassettes and discs expected to play an increasingly larger role in home viewing, it is easy to see that broadcast TV requires total flexibility if it is to survive and flourish.

Now, after the FCC has spent 25 years defending its plan, what is the net result? At last count only 700 (500 VHFs and 200 UHFs) of the plan's proposed 2000 stations are operating on a commercial basis, in only 218 of its proposed 1300 markets. Since broadcast licenses are not expensive, and since they are well-known moneymakers, why haven't the other 1300 station allocations been snapped up? Because the plan creates hundreds of markets that do not contain enough viewers to generate the advertising revenues necessary to support popular programming and thus make the operation profitable. The allocation plan has meant that—with or without competition—a station can rarely operate profitably in a market outside the top 100. Stations in the top-100 markets, about half of all existing stations, earn a whopping 82 percent of total TV profits. This leaves the remaining stations in the bottom 118 markets with a very small portion of the total TV profits to divide.

Stations in the largest cities reach millions of viewers and make money. Networks, through these and other affiliated stations, reach many more millions and make more money. Networks supply 80 percent of all programming to 75 percent of all stations. The 15 stations (five each) owned by the networks are in the most heavily populated markets and together earn 20 percent of all TV profits, more than all stations outside the top-100 markets (about 350) put together. (Network affiliation doesn't confer profits automatically: It confers priority access to programming that is most in demand, but the affiliate's profits are still based on the number of viewers in its area, and many affiliates are marginal operations.)

The three-network system is often said to have a stranglehold on TV programming, but the allocation plan dictates this. Three is the maximum number of stations (either because of the FCC's frequency allocations or be-

To exercise its old power—the FCC would need control over all video.

cause of market population) that can be received by about half of all television homes. A fourth source of national programming would have access to half the viewers that the present networks can reach. The complaint that TV programming lacks any real diversity, may also be blamed to some extent on the allocation plan. Limiting viewing to mainly three choices has meant that they all must appeal to the same viewers. The same thing would happen if automobiles or hats could come in only three styles. All three would be pretty much alike because that would be the most profitable way to market them. But when more choices are allowed, manufacturers of cars and hats diversify their product, satisfy more tastes, and still turn a profit. This would surely happen with a doubling or tripling in the number of national TV choices.

A prime-time network program must attract viewers on roughly a third of all sets in use at the time it is shown, or it will be cancelled. A recent critically acclaimed TV show on the life of Benjamin Franklin drew 15 million viewers, but was not considered a commercial success. Whereas if every household had eight or ten choices instead of three, programming that appeals to a much smaller percentage of viewers could be considered successful since the criteria for success (market share) would change with the addition of more viewing choices.

HOW CAN BROADCAST TV acquire the flexibility it obviously needs to compete with its new technological rivals? How can we eliminate the program controls that have shackled the communications media and that remain an avenue for government intrusion? Property rights in frequencies have been advocated for decades by economists—notably Ronald H. Coase, at the University of Chicago—and others of various political persuasions. They say that having property rights in frequencies is the most direct route to liberty and diversity in television. Henry Goldberg, a communications lawyer in Washington, D.C., who is an authority on broadcast regulation, said in an interview with *INQUIRY* that "getting rid of the FCC or lessening its authority, and providing for property rights in frequencies is the *only* way to achieve both freedom and abundance in TV broadcasting."

Property rights in frequencies would almost certainly result in changes in the manner in which frequencies are used and would lead to the creation of numerous national and regional stations. With property rights, a marginally profitable station's frequency could easily be worth more than its present value if sold or rented to a station seeking a clear coast-to-coast channel. A VHF station might find it more profitable to dispose of its VHF frequency and acquire a less expensive UHF frequency, or to rent a cable channel for its programming. With ownership rights in frequencies—which would be protected by the courts from intrusions by signals from interfering transmitters like any other property right protected against trespass—all sorts of rearrangements for more efficient and profitable frequency use are possible, including use of the same frequency at different times by a local station and a clear-channel station. No doubt one or two national stations would present pay broadcasting, with programming that attracts enough paying subscribers to support it but not enough viewers to justify support from advertisers.

Such changes in frequency use would spread the costs of eight or ten programming choices over a national audience. Vast, thinly populated areas would at last have more than one or two viewing choices. (Several million homes in these areas still cannot receive television broadcasts.) Because of the expense, cable systems cannot now service these areas any more profitably than local stations can. But national stations need only clear channels and relay transmitters to serve them.

Radio has long had clear-channel stations. In the early days radio was not very profitable. Licensees wanting low-powered local stations were few and far between, except in the largest cities. The public demand for radio service, however, forced the FCC to permit a few high-powered, nighttime only, clear-channel radio stations by licensing half the AM stations for daytime operation only. Millions of listeners not reached by their nearest low-powered local station during the day, could at least have radio at night. On December 19, 1978, the FCC gave its blessing to abolishing these 50,000-watt stations and replacing them with 125 slots for local stations. The Van Deerlin draft would also break up these clear-channel stations so that "every community, regardless of size, is provided with maximum, fulltime local broadcast service." A spokesman for the Clear Channel Broadcasting Service testified that this would leave 26 million people without any radio at all.

As can be seen, the proposed bill, despite what critics claim, by no means turns the "public" airwaves over to private use. Neither would it do much to benefit viewers of broadcast television. It shows that at bottom the House subcommittee is more concerned with localism and the measure of control this allows government over TV broadcasting than with whether there is to be more variety in TV or with whether broadcast TV is able to compete well with its technological rivals.

Yet now that the once novel idea of fairly unrestricted use of frequencies in exchange for payment is actually being seriously advocated, it is only a short—but all-important—step further to establish full property rights so that TV itself has the greatest flexibility possible and TV's competitors will not be restricted from expanding and providing additional services that are in demand. Property rights in frequencies would encourage diversity and would put an end to compulsory localism and to government oversight of programming in the "public interest." Such policies may have been lucrative, but they have limited television's potential and denied First Amendment rights to broadcasters, and by extension, to their competitors.

As Congress is about to review the structure and goals of communications law, we repeat the question raised earlier: Will cable be recognized as a legitimate challenger to television broadcasting and TV itself be free to respond to this competition in ways that have long been feasible technologically, or will Congress give the FCC additional authority so that it can "plan" broadcast TV's competitors? ❑

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
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FREEDOM OF INFORMATION CENTER REPORT NO. 399

CATV AND THE BROADCASTERS*

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When some residents of Sussex County, Del., turn on their television sets, they may receive broadcast signals from stations in Baltimore, Washington, D.C., and Salisbury, Md. If they subscribe to a cable television service, they will receive stations from Baltimore, Washington, D.C., and Salisbury, Md. The Sussex Countians are caught in the middle of the controversy over the regulation of CATV.

A group of Delawareans asked (Washington Post, 3-22-78) the Federal Communications Commission in 1978 to stop regulating cable television entirely, especially in Delaware. The second smallest state is one of only two in the nation with no over-the-air commercial broadcasting stations of its own. Sen. Joseph Biden, D-Del., told the commission:

> Baltimore offers absolutely no coverage of Delaware. The least I could conscientiously accept is a break-up of the hold on the many Delaware viewers who receive only the Baltimore perspective; that is, allowing a Philadelphia station to be carried by cable for the areas that do not now have the benefit.

Viewers in northern Delaware can receive the Philadelphia stations as well as Baltimore signals over the air.

But FCC Broadcast Bureau Chief Wallace Johnson replied to Biden by saying the Delaware CATV systems can't carry Philadelphia because the move would hurt one or more of the Baltimore stations, which are received over the air by some Sussex County residents. Johnson's opinion points up one of the major topics of controversy in CATV regulation in 1978: Because the Baltimore stations are closer to southern Delaware, those stations receive protection from the importation of distant signals from Philadelphia. Unfortunately for viewers in the area, for historical and geographic reasons Philadelphia stations are more apt to provide programming related to Delaware. But the regulatory world in broadcasting has begun to change in the late '70s. Viewers may have some relief from these kinds of FCC restrictions at the same time they are offered a wide variety of choices in communications channels in the future.

To Deregulate or Not to Deregulate

Cable television was (Boston Globe, 3-6-77) 28 years old in 1978. According to industry figures, about 85 percent of the cable systems are on the fringes of or outside the 25 major conventional TV markets in the United States. But CATV is beginning to penetrate the large markets. As its subscriptions approach the "magic" 30 percent projected by the networks for 1981, it will more and more challenge over-the-air networks for movies and sports. As CATV comes to dominate the outlying areas and smaller broadcast markets, it may pose a threat as well to the small town broadcasting stations. These fears fueled the fire over the regulation problem in 1977-78.

There are two primary ways CATV is likely to affect broadcasters as it grows the next several years. "Pay-TV" concerns the networks, "distant signal importation" the local broadcaster. Pay-TV involves an extra fee the cable subscriber pays to view a special program that originates with the CATV operation. Distant signal importation involves a cablecaster who brings television signals from other cities into the local market in competition with the local broadcaster. Each has potential to affect over-the-air broadcasters economically, primarily as competition for the television viewers. Broadcasters feel CATV will "fragment" the local market and consequently reduce the value of the license. Networks look toward a time in the not-too-distant future when CATV networks will be able to outbid broadcasters for first-run theatrical films and major sports events.

Broadcasters' fears of the economic threat of CATV are not without merit. From service to 2.1 million subscribers in 1966, CATV has increased (New York Times, 5-4-78) sevenfold. By the end of 1978, the industry estimated, 14 million homes would be wired, serving 42 million persons. The CATV industry expected its revenues to pass the billion dollar mark in 1978. And if the industry can meet its goal of 30 percent penetration of American homes by 1981, CATV officials expect for the first time to become an important rival to over-the-air television.

CATV has capitalized especially in the last decade on

Summary:

The competitive battle between cable television and broadcast stations is being fought on two fronts in the United States in 1978: pay-TV and distant signal importation. Pay-TV most directly competes with the networks by potentially "siphoning" away sports and feature films. Cable systems that import distant signals could potentially "fragment" the local audience. Both areas are more competitive than ever before, thanks to recent court and FCC decisions.

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*Bill Flanagan in Freedom of Information Center Report No. 399, January 1979, 7 pp. Reprinted with permission of School of Journalism, University of Missouri at Columbia, Columbia, Mo. 65201 and the author. Copyright 1979.

FOI REPORT NO. [illegible]
CATV AND THE BROADCASTERS

Americans' love affair with their television sets. The average home has (Boston **Globe**, 3-6-77) the television set on six-and-a-half hours per day. That adds up to 2,300 hours per year, or 300 more annual hours than the average American works. By comparison, Americans spend about 200 hours each year reading newspapers, 200 reading magazines and about 10 hours with books. Since television so dominates the lives of American families, it comes as little surprise that with the chance to have even more channels they will pay anywhere from six to 30 dollars per month.

The selling of cable has relied on what **Celebrity** editor James Monaco calls "blue-sky." "Cable advocates promised a media millennium with enough channels for all minority viewpoints and tastes and, eventually, a whole host of electronic services."[1] That millennium has yet to develop. Even urban penetration is far away. Boston, Chicago and Washington have no inner-city cable service, and metropolitan service is limited in other major cities.

CATV's slow penetration of urban markets can be traced (Boston **Globe**, 3-6-77) to two major factors: the high cost of running cable and the legal and competitive pressures from existing media. To achieve 30 percent saturation by 1981, the CATV companies will have to spend three to four billion dollars. Present cable investment stands at about one billion dollars. The costs have turned some cities away from a "wired" future. The city of Boston turned down a proposal to install CATV in 1973, because wiring the city would have cost 15 to 20 million dollars.

Many CATV owners insist they ultimately will provide a variety of programming and viewpoints. That goal seems critical to the success of CATV. Summarizing prospective effects of deregulation, Yale Braunstein says extra conventional programming frequently has little effect on total audience size, particularly in a market already served by several network and independent stations. But one study on the effect of televising the Watergate hearings has shown that programming "markedly different from the standard fare can attract a significant number of new viewers and increase the total television audience."[2]

Manhattan Cable, for example, is already faced with the problem of trying to retain viewers. The company turned a profit in 1977, one of the first major urban cable systems to do so. But CATV companies can face a "drop-off" rate of about 23 percent a year. Viewers decide to drop their subscriptions. To meet that economic threat, Manhattan Cable has turned to advertising on two of its channels. It offers sponsors a potential audience of 150,000, a "magazine-sized" audience. The CATV system has drawn a quarter of a million dollars in advertising revenues without any full-time salespersons.[3]

These developments lead James Monaco to believe CATV will wind up with an economic structure like magazines:

> The drop-off problem is directly parallel with magazine renewal efforts. Future income will be derived from a combination of paid advertising and subscription fees, plus "individual copy" sales.[4]

A demographic approach to television has some drawbacks. It poses problems for the minority groups that no advertiser wants to reach. It may mean more diversity of programming for different segments of the middle class already served generally by network television. There is the potential to turn the poor even more into second-class citizens as far as television is concerned.

Despite public service implications of the growth of CATV, the broadcasters have good reason for economic fears as well. As the industry moves into 1979, the FCC is looking formally into the economic implications of CATV. Commission Chairman Charles Ferris has called (**Wall Street Journal**, 5-3-78) on the CATV industry to exploit "the substantial number of viewers with specialized interests" left unsatisfied by a broadcast TV industry "caught in the iron grip of the rating competition." Broadcasters claim the diversity sought by the FCC will never come about, and they have fought CATV because of its potential to drain conventional programming. Through pay-TV and distant signal importation, broadcasters feel CATV will provide them with "unfair competition" in the future.

Pay-TV and the Networks

Pay-TV is beginning to pose a competitive threat to the present structure of network broadcasting. It carries a threat to local affiliates because of the potential to undermine the networks. Six hundred CATV systems offered pay-TV channels in 1978, with 1.6 million subscribers in 46 states. Its revenues are approaching the 200 million dollar mark per year. About 25 percent of the total CATV subscribers also buy some pay-TV service.[5]

To some degree all kinds of CATVs are "pay cable." All CATV systems charge some kind of subscription fee, usually on a monthly basis, for the service. But the pay-TV the networks fear is of a somewhat different kind. The subscriber pays his standard monthly subscription fee and pays another fee for a channel of recent feature films, special programming or sports. "Home Box Office" and "Showtime" are two firms that syndicate such a special pay channel nationally. With the use of satellite-to-CATV connections, the pay-TV firms can join a national network of special programming, all for an added fee. Some services charge for each special program viewed, others have a standard fee for all the programming on a given pay channel.

The networks are concerned about pay-TV because the number of CATV viewers needed to outbid the networks for rights to a major motion picture is relatively small. CBS President Arthur Taylor said in 1975 that the network fears are justified:

> . . . the time when pay cable will be able to outbid a network for a movie is likely as close as five years down the road. . . .
>
> With its best and most popular programs lost to pay cable, free television would have far less money to spend on the more expensive but less profitable types of programing which the public has come to depend upon — news, public affairs, children's programs and so forth.[6]

Taylor said in 1978 that the time is approaching when families will be able to view major attractions only by going to the expense of a "large and continual drain on their family income."

> The form of pay television to which we are specifically opposed is that by which free television's attractions are to be diverted to pay cable television. . . . When gasoline is siphoned from one car to another, the car that receives the fuel may work beautifully, but the other is at a severe disadvantage.[7]

In one example of the possible effects of siphoning, CBS pointed to the telecast of the Frazier-Ali heavyweight title fight in 1971. According to the network, about 1.5 million persons paid more than $16 million to see the fight on closed circuit television in the United States and Canada. Overseas, hundreds of millions saw it on over-the-air TV, but they returned only a fraction of that revenue to the promoters.[8]

Others insist the networks have exaggerated their fears. Ralph Baruch, the president and chief executive officer of Viacom International, testified before the House Communications Subcommittee in 1976 that if up to 5 million homes were to subscribe to pay cable, an increase of 700 percent over the number of viewers at that time, without expansion of commercial television audiences, fragmentation would amount to only six-tenths of one percent.[9] An extremely large proportion of the American viewing public would have to subscribe to CATV to significantly cut into the tens of millions tuned into the networks on any given night.

The small number of potential viewers on any given night still has the economic potential to challenge the networks. Although fragmentation may not threaten the networks, National Association of Broadcasters President Vincent Wasilewski cautions that there is a real threat of siphoning, as evidenced by the Frazier-Ali telecast. And the NAB president says (Washington Star, 8-7-75) siphoning is a disservice to the over-the-air audience:

> progress in communications historically has always resulted in a bigger audience at a lesser cost. Pay cable results in a smaller audience at a higher cost. Our broadcasting system could have started out as a pay operation. . . . [A]s late as 1949, there were many people who thought advertiser supportive television could not be successful, and they said the only way to go would be through a pay operation. So, I would say that pay cable represents the antithesis of progress in the communications art.

Competition and 'Exclusivity'

One way the networks have been able to fight the threat of siphoning is through the use of the "exclusive contract." It works well in the battle for broadcast rights to both feature films and sports events. The CATV firms have begun to challenge these "exclusive" contracts in the courts, and this new litigation may mark the next direction for cable-broadcaster affairs.

A recent flare-up over exclusivity occurred in 1977 when Warner Cable in Columbus, Ohio, decided to telecast two Ohio State University football games. Columbus is an ideal market for such a telecast. "People here go stark raving mad on Saturdays," said (**Wall Street Journal**, 9-26-77) cable chairman Gustave Hauser. "Football is the thing here. They want these games. We have a facility to present these games, which aren't being televised anywhere. We're only talking about the games nobody wants."

ABC-TV may not have wanted the Ohio State games, but it did have an exclusive contract for college football with the National Collegiate Athletic Association. The contract does not permit local broadcast of football games that conflict with a network college football broadcast. The NCAA approved the Columbus cablecasts at first, because the network had not announced broadcast times on the two November Saturdays in question. When ABC announced conflicting times, the NCAA revoked Warner Cable's right to telecast the Ohio State games to the local area.

Hauser said (**Wall Street Journal**, 9-26-77) the network's move was not justified: "When an Ohio State game is being played, the people in Columbus who aren't in the stadium are listening to the game on radio, they aren't watching network TV."

In the Columbus instance, the network exclusive rights prevented siphoning. Whether that will always be the case is unsure. Both the Congress and the FCC are looking at the influence of exclusive contracts on programming. The CATV challenge in Columbus could become part of a precedent for changes in the law concerning exclusivity.

The economics of an exclusive contract also comes into play in CATV-broadcaster relations in the world of feature film broadcast rights. Yet filmmakers find themselves both for and against CATV, depending upon which element of modern film distribution is concerned. At present, film studios still must rely on large network contracts to produce any real profit. Cable TV consultant Dick Lubic said it's unlikely filmmakers will abandon the networks until CATV can pay as much for broadcast rights:

> One million subscribers on pay systems would represent income to each of the studios of about $300,000. The studios don't keep all of the dollars but, let's say they receive as much as fifty percent, or $150,000. That amount of money is not very meaningful to them.
>
> And if Home Box Office had ten million pay subscribers, the amount of money that the studios would receive still wouldn't be too meaningful compared to the theater and network purchases. . . . [A]t present, the cable and pay television promoters have to prove they have the road to utopia, and it's going to be a long trek.[10]

Large film studios do not only produce films for theatrical release, they produce many of the network television series. In this area as well they have a vested interest in preserving the status quo in their relationship to over-the-air TV. Motion Picture Association of America President Jack Valenti says pay-TV threatens those profits. Valenti says film companies presently earn about $272 million from prime-time series syndication. A production company can suffer five years of deficit financing as a network supplier before syndication begins. But a cable system has the ability to pick up a distant signal and transmit it into another market where no station has purchased it. Because the program is available in the area, Valenti says it's less likely a broadcaster will purchase it.[11]

The MPAA is fighting to retain some elements of exclusivity and a limitation on the number of signals a cable system can bring into the market. Valenti says importation threatens to reduce the revenue potential of syndicated programming. But the major studios are pushing two ways at once in their desire to rely on network revenues for feature films for the time being, and their desire to stave off distant signals in the local areas.

In the long term, filmmakers claim pay-TV and theatrical films serve two different markets. Industry figures indicate 30 percent of the population between 12 and 25 years of age accounts for 60 percent of the theater-going public. Pay-TV serves an older audience that has lost the movie-going habit. Columbia Pictures Vice President Allen Adler said, "These studies buttress our belief that pay cable will augment, rather than compete with, our theatre sales."[12] With long-term prospects of pay-TV as a potential market, film interests will have a hard time over the next several years trying to decide which side in the CATV-broadcast dispute to get on.

The 'Home Box Office' Case

The FCC for many years made an effort to protect the networks and local stations from siphoning, with strict rules over the kinds of programming allowed on CATV. The regulations permitted feature films on pay-TV only if less than two years or more than 10 had elapsed since their theatrical release. Sports events were available for pay-TV if they had not been broadcast over the air within the previous two years. And series-type programs could not be siphoned for CATV at all. Cable systems had been able to circumvent the rules by incorporating the pay-TV charge into the basic monthly subscription rate, rather than on a per-program basis. One New York cable system used that loophole to offer Rangers hockey and Knickerbockers basketball games to subscribers.[13]

The National Association of Broadcasters favored the regulations and said the rules encouraged pay-TV to develop innovative programming. By removing restrictions on series programming, NAB said the FCC risked damaging its own effort to bring about new program choices.[14]

In 1977 the U.S. Court of Appeals in Washington, D.C., upset the status quo with its ruling in **Home Box Office v. FCC**. The court ruled that the First Amendment does not permit the same type of federal regulation of pay cable that it does of conventional, advertiser-supported television. In striking down FCC pay-cable programming restrictions, the court found the commission did not show that the limitations were necessary to further an "important government interest."[15]

The commission was unable to convince the court whether the alleged siphoning phenomena was real or imagined:

> [T]he Commission has nowhere spelled out even a theory of the dynamic which could result in loss of broadcast television service to regions not served by cable. Nor is such a dynamic readily apparent. For example, cablecasters are unlikely to withhold feature film and sports material from markets they do not serve since broadcast of this material in such markets could not reduce the potential cable audience and because exhibition rights to this material would undoubtedly have substantial value. In these circumstances, the postulated loss of regional service is too speculative to support jurisdiction.[16]

The appeals court also had difficulty understanding FCC protection of feature films in particular:

> with regard to feature films we question how the Commission, which has stated that it has no criteria by which to distinguish among formats, could have determined that feature films are a sufficiently unique format to warrant protection. The record demonstrates that broadcasters are increasingly substituting made-for-television movies — for which "siphoning" is not a problem since the broadcasters own the copyrights — for feature films.[17]

An attempt to control the content of CATV cablecasts was, to the court, "so fraught with the potential for impingement upon First Amendment rights that it should not be sanctioned by implication."[18] Although the court said the FCC could not regulate content, the FCC could apply objectives in regulation for which it could legitimately regulate the broadcast media.

The **Home Box Office** decision turning aside the siphoning protection raised the ire of the broadcasters. But CATV interests felt the ruling did not go far enough in that the networks still had recourse to long-term contracts with filmmakers that would permit them to stop for years the cablecast of films now permitted under the court ruling. The FCC decided to wait a while to see if the 1977 court decision would have any effect in freeing up film broadcast rights before the commission would take any action on the long-term contracts and exclusive rights. CATV chief at the FCC, James Hobson, said the commission would wait to see how the marketplace distributed films.[19]

Even before the **Home Box Office** decision, the Office of Telecommunications Policy had drawn its own conclusions about the projected economic impact of CATV. Paraphrasing its report,

> 1. CATV does not offer an immediate threat to the public in driving over-the-air broadcasting out of business.
> 2. CATV does pose an economic threat to the broadcasters, but only because it threatens monopolistic position. More competition will result in lower profits for the television industry, and the value of the television license will fall. The effects are not broad enough to cause wholesale reductions in the number of broadcast stations.
> 3. Existing television provides sufficient information to enable government officials to undertake a market-by-market analysis of cable. But it's hard to make detailed predictions of which stations might fail.[20]

Distant Signals and the Local Station

Pay-TV has the potential to restructure broadcasting. But it represents only an indirect threat to most station owners. They are more apt to do all they can to stop CATV systems from importing distant signals into the market. The local station owner claims he will be forced off the air if he has to compete with the signal from a much larger city. In that sense, the broadcaster believes distant signal importation serves to reduce the diversity of local channels.

The Supreme Court has upheld the right of the FCC to provide some measure of protection for local television stations. Commission authority over the distant signal question can be traced to the Supreme Court decision in **U.S. v. Southwestern Cable** in 1968. A local station owner in San Diego had complained because a CATV system transmitted signals of Los Angeles broadcasting stations. KFMB-TV contended it was affected adversely, in conflict with the public interest. The court summarized the FCC's contention that

> importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster" . . . and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. In particular, the Commission feared that CATV might, by dividing the

> available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.[21]

The court ruled the FCC had the power to regulate cable television.

But does the threat to the local broadcaster really constitute a threat to the public interest? One economist at the Office of Telecommunications Policy cast some doubt on that:

> An important point to realize is that the audience diversion argument really works against those who would block cable development. Audience diversion can be important enough to threaten many broadcasters only if nearly everyone in a market subscribes to cable and shifts his viewing to new cable services. Yet, if this phenomenon occurs, it is because cable services are generally regarded as superior by most households — in which case there is little reason to protect over-the-air broadcasters.[22]

The FCC chose, however, to provide some measure of protection for broadcasters, regulations the National Cable Television Association in 1977 asked the FCC to remove. The NCTA approached Congress in its House Communications Subcommittee review of the Communications Act of 1934 and proposed putting broadcasters on the defensive against CATV deregulation. Under the plan, if a broadcaster was hurt by distant signals, he could go to the FCC to seek individual relief a year after CATV regulation ceased. The burden would have shifted to the broadcaster to demonstrate harm and to provide financial data to prove his claims.[23] Within a year, the FCC chose on its own to follow a similar path.

For many years since the **Southwestern** decision, the FCC had restricted a CATV system's right to duplicate local programming by importing distant signals. The regulations controlled the zone of protection around each broadcast station. CATVs could import distant signals frequently by blanking out programming that was the same as the local stations. In this fashion, local audiences were forced to look at local commercials in network programming duplicated on both the distant and local station.

The commission decided in 1977 to change its zones of protection. Instead of basing them on a station's signal strength, they would be based on standard 35- and 55-mile protective limits. A group of CBS affiliates and other interested broadcasting parties took the FCC to court over the matter, and the U.S. Court of Appeals in Washington, D.C., upheld the FCC in its decision in **CBS Network Affiliates v. FCC**.

> One attraction of cable television is its ability to import signals from distant stations that cannot be picked up "off the air" on conventional television sets. Importation of distant network programming, however, can injure a local network affiliate by fractionalizing the market for its network offerings.[24]

The court said the FCC has provided some nonduplication rules because:

> First, importation of distant duplicative network signals was seen as unfair competition with the local network affiliates. . . . Second, this practice threatened the financial viability of local affiliates and to that extent disserved the public interest.[25]

But the court upheld the FCC's limitation on the distance of signal protection, despite the contention of the network affiliates that it would hurt them economically. "This may well be the dominant effect," a concurring opinion by Justice Leventhal said. "The new rules may, indeed, work a substantial shift in economic position, but it is not one that the courts can reassess on the ground of lack of reasoned decisionmaking."[26]

The court rejected the argument that the new zones drastically reduce local stations' nonduplication protection. Fixed mileage zones were designed to protect "the heart of the station's market" and didn't alter the basic FCC policy of regulating distant signal importation by cable systems to prevent unfair competition with local network affiliates.[27] In 1978, the FCC took the court's ruling a step further and exempted from nonduplication requirements the rule that a cable system delete network programming on any station which has a significant number of viewers among non-cable subscribers in the area.[28]

The FCC Approached Deregulation

Two FCC decisions in the fall of 1978 have done even more to shake up the distant signal controversy. The rulings concern so-called "superstations." The era of superstations began when CATVs began telecasting WTCG-TV, Atlanta, all over the nation via Satcom and Southern Satellite. In October 1978, the FCC opened the way to an even greater penetration of superstations. The commission endorsed an "open entry" policy for resale carriers that feed local stations to CATVs. Other major independent stations could join WTCG in the push for CATV markets outside the stations' normal broadcast area. WGN-TV, Chicago, has expressed interest. Other possible independents include KTVU-TV, Oakland-San Francisco; KTTV-TV, Los Angeles; and WPIX-TV, New York.[29]

Since superstations receive no direct compensation from the CATVs that distribute their signals, they will have to challenge the networks for the national advertising dollar. WTCG distributed a new rate card to reflect its projected January 1979 penetration of 2.5 million cable subscribers. The Atlanta station claims it can deliver a cost per thousand two-thirds that of the networks and deliver audiences with twice the per capita income. WTCG expects total network audience shares to drop 50 percent during the next five to 10 years with the proliferation of superstations. The networks may soon be as eager to challenge distant signal importation as the affiliates are now.

The FCC continued its move toward deregulation in the fall of 1978 with another ruling that finally shifted the burden of proof of economic harm to the local stations. Prior to October, a CATV seeking waiver of the rule limiting distant signals was required to make two showings:

> (1) that the importation would not adversely affect the ability of the stations in their area to serve the public as a result of loss in either audience or revenues; (2) that there were unique circumstances that justified the waiver.[30]

FOI REPORT NO. 399
CATV AND THE BROADCASTERS

Under the new policy, the second showing is no longer required. The CATV system must show only that the local station would not suffer as a result of the proposed signal importation. If the FCC agrees that the CATV system has a good case, particularly in the telecast of an independent distant signal, it will give the station an opportunity to offer a rebuttal, a rebuttal *Broadcasting* magazine said would put the station's finances at issue.[29]

Along with the decision in the WTCG case, the latest FCC ruling could lead to a proliferation of superstations. The NAB said the commission was engaging in "legislation by waiver." The NCTA said it regarded the action as an interim measure until the FCC completes its cable-broadcast inquiry. NCTA President Robert Schmidt expressed hope the commission would develop a policy whereby cable is regulated in terms of its impact on the public interest, rather than its impact on the "private interest" of broadcasters.

As to the eventual threat of the superstations, FCC CATV Bureau Chief Philip Verveer said it's too early to tell, although the staff is looking into the problems caused by satellite-fed CATV network systems. "For the moment," he said, "the critical element is that there is not enough cable out there, even if the station were carried to every home, to do what's been attributed to the superstations. These stations probably won't end up with larger audiences than those of independent stations in New York."[31]

CATV and the Law

The CATV controversy continues. The federal government seems to be shifting its position toward deregulation. Both the FCC's most recent rule-makings and proposed revisions of the Communications Act of 1934 point in that direction. Scarcity has for years justified the regulation of all facets of broadcasting. There simply were not channels for all the voices that demanded attention. The thrust of proposals to deregulate the broadcast industry takes the view that if competitive forces in the marketplace are allowed to take command, regulation will no longer be necessary to allocate resources. In one of his first public statements on CATV, FCC Chairman Charles Ferris told the NCTA:

> I have noticed in my first few months at the commission that you often have an ambivalent view of regulation and competition.
>
> But you really were not competing with broadcasters — except perhaps in legal pleadings in the regulatory forum. In the marketplace you have largely only helped broadcasters compete more effectively with each other. You have brought UHF stations into technical parity with VHF stations. You have imported distant signals to compete with local ones. But these are services that can be performed by improved television sets, or by translators linked to satellite dishes. You have only just begun to actually compete with broadcasters by offering your own program services.[32]

Ferris told the cablecasters, "You have called yourself a medium of choice, but often you have only provided an echo." The chairman announced an FCC investigation into CATV's economic impact. The inquiry is looking at economic data, but the FCC will maintain its present goals in regulation, "to maintain our system of over-the-air broadcast service, and to foster cable growth in order to provide diversity of programming and broadband communications service." The commissioners continue to believe both elements are compatible.[34]

In addition to the FCC investigation, Congress is considering its own changes in present broadcast regulation. Rep. Lionel Van Deerlin, D-Calif., says the rewrite will clear obstacles from the path of new technologies and promote diversity of communications.[35] His proposed revisions would remove cable from federal regulation. The Senate is also working on revisions to the Communications Act. The communications subcommittee chairman, Ernest Hollings, believes "the marketplace should operate wherever possible." But Hollings would act to control some siphoning. "I fear that if we do not act on sports siphoning now, it is only a matter of time before the Olympics or World Series or Super Bowl will be bought up . . . ."[36]

But the prospect of federal deregulation of CATV may not be completely welcomed by the CATV operator. Besides the legal hassles of dealing with local governments for licensing permits, CATV is also threatened by the growth of new technologies. Democratic Rep. John Murphy of New York says (*New York Times*, 5-4-78) the ultimate fear of both CATV and television "is that there will be a single wire coming into the home — a wire installed and maintained by AT&T, made up of optical fibers, and offering enough channel capacity to carry ordinary telephone messages, an abundance of television programs and all sorts of data communications." The phone company is already well placed to make the necessary connections. Proposals in the rewrite of the Communications Act would include permission for AT&T to enter TV markets.

Other technological developments that could upset the shaky status quo include VHF drop-ins in saturated markets and a new tuner developed by Texas Instruments that can divide the electromagnetic spectrum to increase the number of both VHF and UHF stations capable of being received through the air. UHF parity could double or triple competition.[37]

Conclusion

The seemingly unlimited potential of communications technology and the breakdown of the regulatory barriers imply some sort of future program diversity, either on CATV or over the air. Communications consultant Herbert S. Dordick has said that:

> before the end of the century, all of TV will be on some sort of wire. . . . I believe that one day the networks will decide not to be networks and will concentrate on program production. They'll get others to pull together ad-hoc networks.
>
> The future as we see it is no longer the future. We are ad hocing networks now, picking up fragmented audiences. The mass media is becoming no longer the mass media. Or, as somebody said, the future of TV is radio.[38]

There is little point to making broad predictions about whether pay-TV will eventually out-compete the networks for films and sports, or whether distant signals will so fragment the local markets that local broadcast stations can no longer exist. The views of the CATV operators and broadcasters are by their nature biased in favor of their own media. But recent trends in legislation, regulation and broadcast technology most likely will change the face of American telecasting. It's too early to tell how soon America will be a wired nation, or

333

whether it will be wired with coaxial cable or glass. After 20 years, however, new ideas and technologies are being given the chance to compete for the audience. As CATV shakes itself free of federal regulation, we may see whether, as FCC Chairman Ferris wondered, cable is a medium of choice or only "an echo."

FOOTNOTES

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1. James Monaco, "Television: The Step Away," American Film, November 1976, p. 39.
2. Fred W. Braunstein, review of Deregulation of Cable Television, by Paul W. MacAvoy (ed.) in Federal Communications Law Journal 30 (Winter 1977): 94.
3. Monaco, p. 32.
4. Ibid.
5. "A short course in cable 1978," Broadcasting, 1 May 1978, p. 51.
6. "Networks use NAB hearings as forum for assault on pay cable," Broadcasting, 14 July 1975, p. 27.
7. Arthur R. Taylor, Does the American Family Need Another Mouth to Feed? (New York: CBS, 1976), p. 9.
8. Ibid.
9. "Another face-off on pay cable in House hearing," Broadcasting, 2 August 1976, p. 33.
10. Dick Lubin, "It Will Be a Long Time to the Utopian Land of Pay Cable," TV Communications, October 1975, p. 18.
11. Jack Tusher, "Valenti Warns That Cable Growth May Cut Into TV Syndication Dollars," Variety, 17 May 1978, p. 42.
12. Paul Harris, "Pay Cable Living in Euphoria in U.S.," Variety, 7 April 1976, p. 40.
13. Taylor, p. 14.
14. "NAB Asks Court of Appeals to Block FCC Decision on Pay TV's Series Programs," National Association of Broadcasters news release, 31 December 1975, p. 1.

FOI REPORT NO. [illegible]
CATV AND THE BROADCASTERS

15. "Pay Cable Program Restrictions Found to Violate First Amendment," United States Law Week 45 (12 April 1977): 1152.
16. Home Box Office v. FCC, 2 Med. L. Rptr. 1561 (1977) at 1576 ff.
17. Ibid. at 1573.
18. Ibid. at [illegible]
19. "High Court frees pay cable to bid for sports, flicks," Advertising Age, 10 October 1977, p. 116.
20. Braunstein, p. 95, citing Deregulation of Cable Television, p. 34.
21. U.S. v. Southwestern Cable, 1 Med. L. Rptr. 2267 (1968) at 2254.
22. Braunstein, p. 96, citing Deregulation of Cable Television, p. 36.
23. "NCTA pulls out all the stops in seeking end to all distant signals rules," Broadcasting, 19 September 1977, p. 42.
24. CBS Network Affiliates v. FCC, 2 Med. L. Rptr. 1693 (1977) at 1694.
25. Ibid.
26. Ibid. at 1697-98.
27. "Pay Cable Program Restrictions," p. 1153.
28. Federal Communications Commission, "Cable Television Services," Federal Register 43, no. 73, 10 April 1978, 14557.
29. "Superstation breakthrough," Broadcasting, 30 October 1978, p. 25.
30. "Distant signals closer and closer," Broadcasting, 6 November 1978, p. 34.
31. Ibid.
32. Ibid.
33. Charles Ferris, "Remarks of Charles D. Ferris, Chairman, FCC, before the 27th Annual Convention of the NCTA," Broadcasting, 8 May 1978, p. 32-33.
34. "Just the facts: FCC is going after hard data on economics of cable, broadcast," Broadcasting, 13 June 1977, p. 28.
35. "Cable in 1978: about to break $1 billion barrier," Broadcasting, 1 May 1978, p. 35.
36. "Hollings offers a peek under the tent of his cable legislation," Broadcasting, 13 February 1978, p. 30.
37. Monaco, p. 39.
38. Jim Harwood, "What Will Stop Cable TV? Broadcasters and Congress," Variety, 5 October 1977, p. 64.

Eli A. Rubinstein

Television and the Young Viewer*

The pervasive social influence of television on children is being increasingly documented, but has yet to be translated into a continuing and effective social policy

> For *some* children, under *some* conditions, *some* television is harmful. For *other* children under the same conditions, or for the same children under *other* conditions, it may be beneficial. For *most* children, under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial. [Schramm, Lyle, and Parker 1961, p. 1]

That assessment, made in 1961 by three leading Stanford researchers, was the general conclusion of one of the first major studies of television and children. Almost two decades and about two thousand studies later, their conclusion remains a reasonably accurate evaluation of the complex and differential impact of television on its millions of young viewers. The published research since 1961 has further confirmed the harmful effects to some children of some television under some conditions. At the same time, stronger evidence for the corollary has been found: for some children, under some conditions, some television is beneficial.

It is in the differentiation between *some* children and *most* children and in the distinction between *some* television and *most* television that the scientific findings are still not clear. As in so many other instances of exposure to persuasive messages, it is the cumulative impact over extended periods of time that should be the crucial test of consequences. It seems reasonable to assume that when millions of young viewers each spend on average about a thousand hours per year watching hundreds of television programs, such time spent must have some significant effect on their social development. It is equally reasonable to assume that if the effect is so tangible there should be little difficulty in identifying its characteristics or assessing its strength. Here, however, the evidence is less than definitive—thus the continued applicability of the Schramm, Lyle, and Parker generalization.

While the total impact of television on the young viewer is still unclear, the pursuit of evidence has attracted increasing interest on the part of social scientists. In the appendix to the 1961 report by Schramm et al., 52 earlier publications dealing with television and children are annotated, and they make up a fairly complete list of relevant prior research. By 1970 (Atkin, Murray, and Nayman 1971) that list of publications had grown to a total of almost 300 citations. By 1974 a total of almost 2,400 publications were cited under the category of television and human behavior in a major review of the field by Comstock and Fisher (1975). Since 1974, research interest has continued unabated as new topics begin to be explored. The concern about televised violence has been augmented by a concern about sex on television, the persuasive power of television advertising on children, and, indeed, the effect of television on the entire socialization process of children.

Two events in the early 1970s provided the most compelling influence toward that growth of interest. One was the development of the program "Sesame Street," in which formative research was pursued in partnership with the production of the program itself. The other was the completion in 1972 of a major federally funded research program, now known as the Surgeon-General's program, to evaluate the relationship between TV violence and aggressive behavior in children.

"Sesame Street"

"Sesame Street" provides the most extensive example of how television can be made beneficial for some children under some conditions. The story of its growth and development has been effectively told by its educational director (Lesser 1974). From the research perspective, "Sesame Street" marks a major innovation: it is the first intensive and continuing partnership between education specialists from academia and the creative and technical specialists responsible for putting television programs on the air. How that partnership evolved into not just constructive interchange but productive results is itself a lesson in formative research.

The educational goals of "Sesame Street" were developed over a series of working seminars in 1968, with participation by experts from all relevant specialties. The instructional goals were precisely formulated in a series of specific statements on five major topics: (1) social, moral, and affective development; (2) language and reading; (3) mathematical and

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numerical skills; (4) reasoning and problem solving; (5) perception. The target audience was disadvantaged inner-city children.

Overall, the development of the total program toward the achievement of those goals was structured by the continuing interplay of production people and academic researchers in a feedback system involving observation of children viewing programs as they were produced. Happily, all the major participants in this innovative enterprise were completely dedicated to the larger task. Of equal good fortune was the initial allocation, from private and public sources, of $8 million for the start-up and production costs for the first eighteen months of "Sesame Street." While those three ingredients—dedicated talent, adequate start-up time, and ample funding—do not always produce success, they certainly represent a good beginning and were put to constructive use in the development of the program.

Some ten years after its introduction, "Sesame Street" has become not just a national but an international phenomenon. In addition to being the most widely viewed children's program in the United States, "Sesame Street," in both the original version and in foreign-language versions, is broadcast in more than 50 countries around the world. The Children's Television Workshop, the parent body for "Sesame Street" and all the other educational programs, cites more than 120 articles and books (Children's Television Workshop 1977) primarily on "Sesame Street" and "The Electric Company." Additional publications through early 1978 bring the total above 150 research reports. These range from studies of attention during the actual program viewing to major evaluations of both "Sesame Street" and "The Electric Company." The total literature provides an unprecedented body of research on how the entertainment appeal of television can be put to educational use.

Most, but not all, of the evaluations are positive. One major study suggests that "Sesame Street" has been less useful to disadvantaged children than advantaged children (Cook et al. 1975) because of differences in viewing interest. And, in England, for example, grave concern was initially raised that the very format of "Sesame Street" is inimical to the learning process because the program overemphasizes sheer attention-getting devices and because it links learning too closely to a commercial entertainment format. (Subsequently, "Sesame Street" was aired in Great Britain and achieved much viewer success.)

But these are issues for the educators. From the standpoint of research on television and the young viewer, the history of "Sesame Street" has been of great significance. Formative research has achieved a new status through the ongoing efforts to evaluate the progress and achievements of what Joan Ganz Cooney, the director of the entire enterprise, has called "a perpetual television experiment." The program has clearly demonstrated that television can teach children while still holding their voluntary attention as well, if not better, than conventional television programming. It is the clearest example of the positive potential of television translated into performance.

Televised violence

At about the same time that "Sesame Street" was being prepared for broadcast in 1969, a major federal research program was initiated to assess the effects of televised violence on children. The history of that research enterprise has been thoroughly described and evaluated from a variety of perspectives (Bogart 1972; Cater and Strickland 1975; Rubinstein 1975). The belief is fairly widespread that the body of research, published in five volumes of technical reports, provided a major new set of findings.

There is much less agreement about the report and conclusions of the advisory committee itself, because of the cautious language used. Even now, years after the report was published, the conclusions are debated. The debate was sparked initially because of a misleading headline in a front-page story in the *New York Times* ("TV Violence Held Unharmful to Youth") when the report was first released. A careful analysis of the subsequent press coverage revealed how influential that headline was in further confusing the interpretation of the findings (Tankard and Showalter 1977). The committee had unanimously agreed that there was some evidence of a causal relationship between televised violence and later aggressive behavior. However, the conclusion was so moderated by qualifiers that it was, and still is, criticized and misinterpreted by industry spokesmen as being too strong and by researchers as being too weak.

The effect of televised violence has been an issue of public concern almost from the inception of television in the early 1950s. Periodically, over the past 25 years, a variety of congressional inquiries as well as commissioned reports have drawn attention to the problem of televised violence. In almost every instance concern was raised about harmful effects. In all these reports, however, relatively little new research on the problem was produced. Even the prestigious Eisenhower Commission, which was asked by President Johnson in 1968 to explore the question within its total inquiry into violence in America, devoted its attention primarily to a synthesis of existing knowledge rather than to collecting new scientific information. Its conclusions—that violence on television encourages real violence—were seen as less than persuasive and were largely ignored, especially since attention was then focused on the new Surgeon-General's Committee.

The Surgeon-General's program provided the first major infusion of new monies into research on television violence, which in turn has stimulated a "second harvest," as Schramm (1976) calls it, of new work on television and social behavior. The debate on the evidence from the five volumes of research reports produced in 1972 by the Surgeon-General's program is also still lively. The essence of the debate emerges from two contrasting approaches to assessing the evidence. The Surgeon-General's advisory committee, while acknowledging flaws in many of the individual studies, held that the *convergence* of evidence was sufficient to permit a qualified conclusion indicating a causal relationship between extensive viewing of violence and later aggressive behavior. This conclusion, without the qualifications, is endorsed by a number of highly respected researchers, some of whom participated in the Surgeon-General's program and some who were not directly involved.

A different and seemingly more rigorous approach to the evidence is adopted by some other experts in the field. This contrasting view is epitomized by Kaplan and Singer (1976), who conclude that the total evidence does no more than support the null hypothesis.

A brief explanation is appropriate here about the theoretical formulations most common in the research underlying the whole question of television and aggressive behavior. Quite simply, three possibilities exist—and all have their proponents. (1) Television has no significant relationship to aggressive behavior. (2) Television reduces aggressive behavior. (3) Television causes aggressive behavior; a variant on this possibility is that both television viewing and aggressive behavior are related not to each other but to a "third variable" which mediates between the first two variables.

The Kaplan and Singer position, to give one recent example, is that the research so far has demonstrated no relationship between televised violence and later aggressive behavior. They characterize this as the "conservative" assessment of the evidence and come to that conclusion by finding no study persuasive enough in its own right to bear the burden of significant correlation, let alone causal relationship. They are not the only ones to conclude "no-effect": Singer (1971) came to the same conclusion, as did Howitt and Cumberbatch (1975).

The second point of view has been espoused primarily by Feshbach (1961). The catharsis hypothesis holds that vicarious experience of aggressive behavior, as occurs in viewing TV violence, may actually serve as a release of aggressive tensions and thereby reduce direct expression of aggressive behavior. This view has not been supported by research evidence, although it emerges time and again as a "common-sense" assessment of the relationship between vicarious viewing of violence and later behavior. Indeed, the thesis itself goes back to Aristotle, who considered dramatic presentations a vehicle for discharge of feelings by the audience. The Surgeon-General's committee, in considering this thesis, made one of their few unequivocal assessments—that there was "no evidence that would support a catharsis interpretation."

The third general conclusion, and the one now prevailing, is that there is a positive relationship between TV violence and later aggressive behavior. This facilitation of later aggression, explained primarily by social learning theory, is endorsed by a number of investigators. The basic theoretical formulation is generally credited to Bandura (Bandura and Walters 1963), who began his social learning studies in the early 1960s, when he and his students clearly demonstrated that children will imitate aggressive acts they witness in film presentations. These were the so-called "bobo doll" studies, in which children watching a bobo doll being attacked, either by a live model or a cartoon character, were more likely to imitate such behavior. These early studies were criticized both because bobo dolls, made for rough and tumble play, tend to provoke aggressive hitting and because the hostile play was only against inanimate play objects. Later studies have demonstrated that such aggression will also take place against people (Hanratty et al. 1972).

Variations on the basic social learning theory are rather numerous. Kaplan and Singer make a useful schema by incorporating three related theoretical branches under the general label of "activation hypotheses." Bandura and his students are included in the category of social learning and imitation. A second branch is represented by Berkowitz and his students, who follow a classical conditioning hypothesis, in which repeated viewing of aggressive behavior is presented to build up the probability of aggressive behavior as a conditioned response to the cues produced in the portrayal. A number of experiments by Berkowitz and his colleagues have shown that subjects viewing a violent film after being angered were more likely to show aggressive behavior than subjects, similarly angered beforehand, who saw nonaggressive films (Berkowitz 1965, Berkowitz and Geen 1966).

In still a third variation on the activation approach, Tannenbaum (1972) holds that a generalized emotional arousal is instigated by emotionally charged viewing material and that this level of arousal itself is the precursor of the subsequent behavior. Any exciting content, including erotic content, can induce this heightened arousal. The nature of response is then a function of the conditions that exist at the time the activation of behavior takes place. Thus, according to this theory, it is not so much the violent content per se that induces later aggressive behavior as it is the level of arousal evoked. Subsequent circumstances may channel the heightened arousal in the direction of aggressive behavior.

In an important examination of the utility of these various formulations, Watt and Krull (1977) reanalyzed data on 597 adolescents from three prior studies, involving both programming attributes (such as perceived violent content) and viewer attributes (such as viewing exposure and aggressive behavior) through a series of correlations. They contrasted three models, which they labeled catharsis model, arousal model, and facilitation model. The first two models are essentially as described above. The facilitation model is identified as a general social-learning model without regard to whether the process is primarily imitation, cueing, or legitimization of aggressive behavior. Thus, the Bandura and Berkowitz studies both fall into the facilitation model.

Through a series of partial correlations, Watt and Krull found (1) no support for the catharsis model; (2) support for a combination of the facilitation and arousal models; and (3) some differences due to age and/or sex, with the arousal model a somewhat better explanation for female adolescents, whereas the facilitation model better described the data for males. (Sex differences in results in many studies of television and behavior are quite common. One of the major studies in the field, by Lefkowitz et al., 1972, found significant correlations between TV violence and later aggressive behavior with boys but not with girls.)

What are the implications in this continuing controversy about the effects of television violence on aggressive behavior? As in so many other social science issues it depends on what you are looking for. The dilemma is neatly characterized in a legal case in Florida in October 1977, in which the defense argued that an adolescent boy, who admittedly killed an elderly woman, was suffering from "involuntary subliminal television intoxication." (This term, which appears nowhere in the scientific literature, was introduced by the defense attorney.) In trying to show that the scientific evidence on television's effects on behavior was not directly pertinent to this murder trial, the prosecuting attorney asked an expert witness if any scientific studies indicated that a viewer had ever been induced to commit a serious crime following the viewing of TV violence. The (correct) answer to that question was "no." The judge thereby ruled that expert testimony on the effects of televised violence would be inadmissible and brought back the jury, which had been sequestered during the interrogation of the expert witness. On the basis of the evidence presented to it, the jury found the defendant guilty of murder and rejected the plea of temporary insanity by virtue of "involuntary subliminal television intoxication."

While there is indeed no *scientific* evidence that excessive viewing of televised violence can or does provoke violent crime in any one individual, it is clear that the bulk of the studies show that if large groups of children watch a great deal of televised violence they will be more prone to behave aggressively than similar groups of children who do not watch such TV violence. The argument simply follows from the basic premise that children learn from all aspects of their environment. To the extent that one or another environmental agent occupies a significant proportion of a child's daily activity, that agent becomes a component of influence on his or her behavior. In a recent comprehensive review of all the evidence on the effects of television on children, Comstock et al. (1978) conclude that television should be considered a major agent of socialization in the lives of children.

An important confirmation of the more general influence of television on the young viewer derives from research on the so-called "prosocial" effects of television. Stimulated by the findings of the Surgeon General's program, a number of researchers began in 1972 to explore the corollary question. If TV violence can induce aggressive behavior, can TV prosocial programming stimulate positive behavior? By 1975, this question was of highest interest to active researchers in the field, according to a national survey (Comstock and Lindsey 1975).

A significant body of literature has now been generated to confirm these prosocial effects (Rubinstein et al. 1974; Stein and Friedrich 1975). Research by network scientists (CBS Broadcast Group 1977) has confirmed that children learn from the prosocial messages included in programs designed to impart such messages. Because the effect of prosocial program content is so clearly similar in process to the effect of TV violence, confirmation of the former effect adds strength to the validity of the latter effect.

In all the intensive analysis of the effects of TV violence, perhaps the one scientific issue most strongly argued against by the network officials has been the definition and assessment of levels of violent content. The single continuing source of such definition and assessment has been the work of Gerbner and his associates (Gerbner 1972). Beginning in 1969 and continuing annually, Gerbner has been publishing a violence index which has charted the levels of violence among the three networks on prime time. The decline in violence over the entire decade had been negligible until the 1977–78 season (Gerbner et al. 1978), following an intensive public campaign against TV violence by both the American Medical Association and the Parent-Teacher Association.

Gerbner's definition of violence is specific and yet inclusive—"the overt expression of physical force against others or self, or compelling action against one's will on pain of being hurt or killed or actually hurting or killing." Despite criticism by the industry, the Gerbner index has been widely accepted by other researchers. An extensive effort by a Committee on Television and Social Behavior, organized by the Social Science Research Council to develop a more comprehensive violence index, ended up essentially endorsing Gerbner's approach (Social Science Research Council 1975).

Perhaps of more theoretical interest than his violence index is Gerbner's present thesis that television is a "cultural indicator." He argues that television content reinforces beliefs about various cultural themes—the social realities of life are modified in the mind of the viewer by the images portrayed on the television screen. To the extent that the television world differs from the real world, some portion of that difference influences the perception of the viewer about the world in which he or she lives. Thus, Gerbner has found that heavy viewers see the world in a much more sinister light than individuals who do not watch as much television. Gerbner argues that excessive portrayals of violence on television inculcate feelings of fear among heavy viewers, which may be as important an effect as the findings of increased aggressive behavior. Some confirmation of this feeling of fear was found in a national survey of children (Zill 1977): children who were heavy viewers were reported significantly more likely to be more fearful in general than children who watched less television.

TV advertising

An area of research that has been increasing in importance since the work of the Surgeon General's program has been concerned with the effects of advertising on children. One of the technical reports in the Surgeon General's program described a series of studies on this topic by Ward (1972), which was among the first major published studies in which children's reactions to television advertising were examined in their relationship to cognitive development. That report provided preliminary findings on (1) how children's responses to television advertising become increasingly differentiated and complex with age; (2) the development of cynicism and suspicion about television messages by the fourth grade; (3) mothers' perceptions about how television influences their children; and (4) how television advertising influences consumer socialization among adolescents.

The entire field of research on effects of television advertising—at least academic published research—has only begun to develop in the 1970s. A major review of the published literature in the field was sponsored and published by the National Science Foundation in 1977 (Adler 1977). It is noteworthy that only 21 studies, all published between 1971 and 1976, were considered significant enough to be singled out for inclusion in the review's annotated appendix. The total body of evidence is still so small that no major theoretical formulations have yet emerged. Instead, the research follows the general social-learning model inherent in the earlier research on televised violence.

Despite the lack of extensive research findings on the effects of television advertising on children, formal concern about possible effects began to emerge in the early 1960s. Self-regulatory guidelines were adopted by the National Association of Broadcasters in 1961 to define acceptable toy advertising practices to children. Subsequently, published NAB guidelines were expanded to include all advertising directed primarily to children. An entire mechanism has been established within the industry, under the responsibility of the NAB Television Code Authority, through which guidelines on children's advertising—as well as other broadcast standards—are enforced. In addition, in 1974 the National Advertising Division of the Council of Better Business Bureaus established a Children's Advertising Review Unit to help in the self-regulation of advertising directed to children aged eleven and under. That organization, with the assistance of a panel of social science advisors, developed and issued its own set of guidelines for children's advertising.

The role of research in helping to make those guidelines on children's advertising more meaningful is only now receiving some attention, thanks in part to the NSF review cited above. Two recent events have highlighted both the paucity and the relevance of research in this field. In 1975, the Attorney General of Massachusetts, in collaboration with Attorneys General of other states, petitioned the Federal Communications Commission to ban all drug advertising between 9 A.M. and 9 P.M., on the ground that such advertising was harmful to children. After a series of hearings in May 1976, at which researchers and scientists testified, the petition was denied for lack of scientific evidence to support the claim.

In 1978, the Federal Trade Commission formally considered petitions requesting "the promulgation of a trade rule regulating television advertising of candy and other sugared products to children." A comprehensive staff report on television advertising to children (Ratner et al. 1978) made recommendations to the FTC, citing much of the relevant scientific literature on advertising to children as evidence supporting the need for such a trade rule. At the time of this writing, the entire matter was still under active consideration.

What does the existing research in this area demonstrate? It is clear that children are exposed to a large number of television commercials. The statistics themselves are significant. Annually, on average, children between two and eleven years of age are now exposed to more than 20,000 television commercials. Children in this age group watch an average of about 25 hours of television per week all through the year. The most clichéd statistic quoted is that, by the time a child graduates from high school today, he or she will have spent more time in front of a television set (17,000 hours) than in a formal classroom (11,000 hours). Indeed, all the statistics on television viewing from earliest childhood through age eighteen show that no other daily activity, with the exception of sleeping, is so clearly dominant.

Just as was shown in the earlier research examining the effects of programming content, even the limited research now available on television commercials documents that children learn from watching these commercials. Whether it is the sheer recall of products and product attributes (Atkin 1975) or the singing of commercial jingles (Lyle and Hoffman 1972), the evidence is positive that children learn. More important, children and their parents are influenced by the intent of these commercials. One study (Lyle and Hoffman 1972) showed that nine out of ten preschool children asked for food items and toys they saw advertised on television.

A number of studies have also revealed various unintended effects of television advertising. While a vast majority of the advertisements adhere to the guidelines that attempt to protect children against exploitative practices, a number of studies have shown that, over time, children begin to distrust the accuracy of the commercial message. By the sixth grade, children are generally cynical about the truthfulness of the ads. A recent educational film by Consumers Union, on some of the excessive claims in TV advertising, highlights the problem of disbelief (Consumers Union 1976). There have also been a number of surveys in which parents have indicated negative reactions to children's commercials. In one study (Ward, Wackman, and Wartella 1975) 75% of the parents had such negative reactions.

In the survey of the literature evaluated in the 1977 NSF review, the evidence is examined against some of the major policy concerns that have emerged in the development of appropriate guidelines on children's advertising. These concerns can be grouped into four categories: (1) modes of advertising; (2) content of advertising; (3) products advertised; and (4) general effects of advertising.

Studies of "modes of advertising" show, for example, that separation of program and commercial is not well understood by children under eight years of age. While these younger children receive and retain the commercial messages, they are less able to discriminate the persuasive intent of the commercial and are more likely to perceive the message as truthful and to want to buy the product (Robertson and Rossiter 1974).

The format and the use of various audio-visual techniques also influence the children's perceptions of the message. This influence is clearly acknowledged by the advertisers and the broadcasters, who have included explicit instructions in the guidelines, especially for toy products, to ensure that audio and video production techniques do not misrepresent the product. What little research there is on this entire aspect of format is still far from definitive. What is clear is that attention, especially among young children, is increased by active movement, animation, lively music, and visual changes. (All of this, and more, is well understood by the advertising agencies and those who develop the ads, and they keep such knowledge confidential, much as a trade secret.)

One other relatively clear finding on audio-visual technique relates to the understanding of "disclaimers"—special statements about the product that may not be clear from the commercial itself, such as "batteries not included." A study of disclaimer wording and comprehension (Liebert et al. 1977) revealed that a standard disclaimer ("some assembly required") was less well understood by 6- and 8-year-olds than a modification ("You have to put it together"). The obvious conclusion—that wording should be appropriate to the child's ability to understand—is just one of the many ways in which this research can play a role in refining guidelines.

Studies on the content of advertising have shown that the appearance of a particular character with the product can modify the child's evaluation of the product, either positively or negatively, depending on the child's evaluation of the character. It is also clear that children are affected in a positive way by presenters of their own sex and race (Adler 1977). On a more general level, sexual stereotypes in advertising probably influence children in the same way they do in the program content.

Although there is relatively little significant research on the effects of classes of products, two such classes have been under intense public scrutiny in recent years: proprietary drug advertising and certain categories of food advertising. Governmental regulatory agencies are currently considering what kind of controls should be placed on such advertising to children.

Concerning the more general effects of advertising targeted to children, surveys suggest that parents have predominantly negative attitudes about such advertising because they believe it causes stress in the parent-child relationship. Studies on questions such as this, and on the larger issue of how such advertising leads to consumer socialization, are now being pursued. Ward and his associates (Ward, Wackman, and Wartella 1975) have been examining the entire question of how children learn to buy. The highly sophisticated techniques used by advertisers to give a 30-second or 60-second commercial strong impact on the child viewer make these commercials excellent study material for examining the entire process of consumer socialization. Much important research still remains to be done on this topic.

Sex on TV

Of the many public concerns about television and its potentially harmful effects on children, the issue of sex on television is at present among the most visible and the least understood. If research on the effects of advertising is still in its early development, research on sex on television has hardly begun.

It has been found that children who watch large amounts of television (25 hours or more per week) are more likely to reveal stereotypic sex role attitudes than children who watch 10 hours or less per week (Frueh and McGhee 1975). Research has documented the stereotyping on television of women as passive and rule-abiding, while men are shown as aggressive, powerful, and smarter than women. Also, youth and attractiveness are stressed more for females than males. This evidence of stereotyping was included as one part of an argument by the U.S. Commission on Civil Rights that the Federal Communications Commission should conduct an inquiry into the portrayal of minorities and women in commercial and public television drama and should propose rules to correct the problem (U.S. Commission on Civil Rights 1977). Program content in 1977 and 1978 has given increased emphasis to so-called "sex on television," at the same time that violence on television is decreasing (Gerbner et al. 1978).

Despite all the public concern and attention, including cover stories in major newsweeklies, relatively little academic research has been done on sex on TV. Two studies reported in 1977 provided information on the level of physical intimacy portrayed on television (Franzblau et al. 1977 and Fernandez-Collado and Greenberg 1977). Franzblau, Sprafkin, and Rubinstein analyzed 61 prime-time programs shown on all three networks during a full week in early October 1975. Results showed that, while there was considerable casual intimacy such as kissing and embracing and much verbal innuendo on sexual activity, actual physical intimacy such as intercourse, rape, and homosexual behavior was absent in explicit form.

Fernandez-Collado and Greenberg examined 77 programs aired in prime time during the 1976-77 season and concluded that intimate sexual acts did occur on commercial television, with "the predominant act being sexual intercourse between heterosexuals unmarried to each other." An examination of the data, however, reveals that in this study, verbal statements—identified as verbal innuendo in the study by Franzblau et al.—served as the basis for the conclusion reached. In fact, explicit sexual acts such as identify an R- or an X-rated movie do not occur on prime-time network television.

Even though few published studies have so far examined the question of sex on television, at least two important issues have been highlighted by the two studies mentioned above. The most obvious point is the difference in interpretation of the data by the two reports—unfortunately not an uncommon occurrence in social science research. Labeling and defining the phenomena under examination, let alone drawing conclusions from results, show variations from investigator to investigator. While this kind of difference is not unique to the social sciences, the more complex the data and the less standard the measurement—qualities often inherent in social science studies—the more likely these individual differences of interpretation.

The second point illustrated by these two studies of sex on TV is more intrinsic to the subject matter itself. The public concern about sex on TV suggests that the general reaction is much in keeping with the substitution of behavior for verbal statements, as is found in the study by Fernandez-Collado and Greenberg. And, in fact, there are no scientific data to indicate that verbal innuendo may not affect the young viewer as much—or as little—as explicitly revealed behavior. What is important here is that we do not know the effects of either the verbal description or the explicit depiction on the young viewer. Research findings of the Commission on Obscenity and Pornography in 1970 suggest that exposure to explicit sexuality seems harmless. Nevertheless, public sensitivities are clearly high; whether those sensitivities are justified by the facts still remains an open question. At the very least, studies should be undertaken to give some objective answers to these questions.

One such effort is a recent content analysis by Rubinstein and his colleagues (Silverman et al. 1978), which confirms the absence of explicit sex in network programs aired in the 1977–78 season but documents a continued increase in sexual innuendo. Furthermore, sexual intercourse, which was never even contextually implied in the 1975–76 analysis by Franzblau et al. (1977), was so implied fifteen times during the week of programs analyzed in the 1977–78 report. Clearly the current decrease in violent content is partially offset by added emphasis on sexual content.

Issues of policy

What are the policy implications of research on television and social behavior? Perhaps the most fundamental point to be made is that even with fairly clear research findings, the policy to be followed rarely emerges as a direct result of the research.

The history of the Surgeon General's program provides a useful case study of the complexities of this issue. When the Surgeon General's program of research was initiated, the advisory committee was charged by the Secretary of HEW, Robert Finch, with the responsibility for answering the question originally raised by Senator John Pastore, Chairman of the Senate Subcommittee on Communications: Does the viewing of TV violence stimulate aggressive behavior on the part of young children? The committee was specifically enjoined from making policy recommendations, since the HEW has no regulatory responsibility in this area. Thus, when the committee report was issued in 1972, there was no discussion of direct policy implications, nor were there any specific policy recommendations in that final document.

Senator Pastore, on receiving the report in January 1972, was sufficiently concerned, both about the cautious wording of the conclusion and the absence of policy recommendations, to call another set of hearings in March 1972 to clarify the interpretation of the results and to ask the committee members for their policy recommendations now that they were no longer under official constraints. What Senator Pastore learned at those hearings is now a familiar characteristic of scientists speaking out on public policy: their scientific expertise affords them little advantage in the public policy arena. There were relatively few workable and concrete policy recommendations forthcoming. Indeed, the most specific recommendation came from the Senator himself: a request to the Secretary of HEW and the FCC that an annual violence index be published that would measure the amount of televised violence entering American homes. No such official index has ever emerged, although Gerbner has annually produced such a measure, as a continuation of his ongoing research program.

What is clear from an examination of the Surgeon General's program in retrospect is that the advisory committee was correctly confined to the examination of the research question. But the next step was not taken—to set up a different committee, to develop policy recommendations on the basis of that research and in keeping with legal constraints and operational feasibility. Indeed, it might well have taken more time and care to examine the complexities of social policy in order to come to realistic and useful conclusions about a social course of action than it took to evaluate the research findings.

Attempts at policy formation concerning sexual content on TV will bring the complexities of social science research to public attention. For example, as Dienstbier (1977) has pointed out, the conclusions of the Surgeon General's committee affirm the social learning model. The Commission on Obscenity and Pornography, on the other hand, concluded in 1970 that exposure to explicit sexuality seemed harmless. Aside from the fact that the differences in these two sets of conclusions may be partly a reflection of liberal versus conservative value judgments relating to aggression and sex (Berkowitz 1971), there are some intriguing implications for social policy in other differences between the portrayal on television of violence and physical intimacy. Dienstbier suggests that increased portrayal of sex on television may become an important substitute for extensive sex education programs. While such an assertion may provoke considerable debate among social scientists, let alone the public at large, it is worthy of further consideration, as still another pertinent research question.

Difficulties in arriving at policy guidelines for advertising to children are equally apparent. In connection with the current FTC examination of the merits of a trade rule to regulate television advertising of candy and other sugared products to children, the scientific evidence, primarily derived from the NSF report (Adler 1977) and from the interpretation of that evidence by the FTC (Ratner et al. 1978), is the source of much debate. Some of the scientists who contributed to the literature are publicly complaining that their findings are misinterpreted in the FTC staff report (Schaar 1978).

It is a minor irony that researchers are just as quick to take issue with interpretations—which they say go beyond the data—designed to support some change in policy on television advertising as their colleagues were in 1972 to take issue with interpretations by the Surgeon-General's committee which they felt did not go as far as their data indicated. The correct generalization may well be that social scientists find it difficult to accept someone else's interpretation of their findings regardless of the direction of the policy implications.

In all the present examination of research on television and social behavior and its implications for social policy there are a number of important issues to consider. One point that bears repeating is that the research does not by itself identify the policy direction. Nor, for that matter, does the research to date satisfactorily deal with the many research questions that are relevant to the policy directions. At a major conference on priorities for research on television and children held in Reston, Virginia, in 1975 (Ford Foundation 1976), an entire agenda for future research was developed. Topics and methodology recommended ranged from simple experiments to identify effects of disclaimers and warnings in television advertising to long-range studies, including cross-national studies, to study the effects of television on political and social beliefs.

However, except for the Surgeon-General's program of research, plus a new program supported by the NSF in 1976 following the 1975 Reston conference, no major federal program of research exists. Time and again over the past twenty years, following

Various congressional hearings dealing with the effects of television, recommendations have been made for a "television research center." In early 1978, Senator Wendell Anderson of Minnesota began exploring the feasibility of legislation to develop a "Television Impact Assessment Act," but to date no final draft bill has materialized.

The three major networks, primarily responding to the pressures from the Surgeon General's program, have expended since 1970 approximately $3 million, primarily on the issue of televised violence. The American television industry seems much less willing to examine the need for a major program of research than does the British Broadcasting Corporation, which, in 1976, commissioned an eminent sociologist, Elihu Katz, to develop a comprehensive set of recommendations for a program of social research (Katz 1977). With the American television industry operating at about a $10 billion annual budget, even one-tenth of one percent devoted to social research would amount to $10 million a year. What Katz has recommended to the BBC would serve well both the American television industry and the public: a comprehensive program of research under the auspices of a new foundation funded by a variety of sources, including the broadcasting industry.

What is critical in such an endeavor is that it be seen as a long-term program. In an earlier paper (Rubinstein 1976) I proposed such a long-term instrumentality that would include studying ways of enhancing the value of television to the child viewer. It is likely that important findings still to be uncovered may provide guidelines for making television a more useful agent of socialization than it is at present.

A whole series of new populations of television viewers await the benefits of a constructive examination of the way television influences our lives. The evidence is already clear that older people watch increasing amounts of television. Organizations of older individuals have begun to criticize the televised stereotypes of the helpless and infirm elderly. Recent public broadcast programming such as "Over Easy," directed to an older audience, has shown how television can be of specific interest and benefit to this population.

Another group worthy of special attention includes the institutionalized mental patients, who, in public mental hospitals, watch a large amount of commercial television in their day rooms (Rubinstein et al. 1977). Careful study may provide insights into how this leisure-time activity can be converted into a more meaningful part of the total therapeutic program of the institution. Rubinstein and his colleagues have been studying the effects of TV on institutionalized children (Kochnower et al. 1978).

A bridge between research and policy

What was initially a narrow focus on the presumed harmful effects of televised violence has begun to broaden into other areas that may have even more extensive and important policy implications. Social scientists can make important contributions to policy determinations, but there are important constraints that must be understood and accepted. In a persuasive argument, Bevan (1977) makes a case for the role of the scientist in contributing to the policy process. He stresses the need for scientists to "seek active roles in policy-making both in the public and in the private sectors." Fundamental to taking such a role is the need to recognize the difference between the world of the scientist and the world of the public official. There is a basic dichotomy between an emphasis on scientific inquiry and an emphasis on action and decision-making. That dichotomy is just as real between the social scientist looking at television and its effects on the viewer and the television officials who have the daily responsibility for deciding what does or does not go on the air.

All too often the social scientist venturing into television policy considerations makes naively sweeping recommendations with no understanding of the enormous complexity of responding to all the pressures and necessities of production. At the same time, some responsible members of the television industry take refuge in a defensive posture about the implications of the research findings. In this context, a variation on Bevan's recommendation that scientists engage in the policy process would be that the social scientists and the television industry officials engage in a continuing dialogue on how the research on television and children can be more effectively utilized.

Fortunately, some efforts in this direction are already under way. All three networks have a variety of activities in which outside research consultants meet with television personnel on programming for children. Special conferences and workshops on research have been sponsored in recent years by foundations, by the industry, by citizen action groups, and by professional organizations.

Perhaps the most compelling reason for more collaboration among all sectors—industry, researchers, the viewing public, foundations, and government agencies—is the common objectives held. Television is now a dominant voice in American life. It is a formidable teacher of children. Its healthy future should be the interest and responsibility of all of us.

References

Adler, R. 1977. *The Effects of Television Advertising on Children.* NSF.

Atkin, C. 1975. *Effects of Television Advertising on Children. First Year Experimental Evidence.* Report # 1. Mich. State Univ.

Atkin, C. K., J. P. Murray, and O. B. Nayman, ed. 1971. *Television and Social Behavior. The Effects of Television on Children and Youth: An Annotated Bibliography of Research.* U. S. Government Printing Office.

Bandura, A., and R. H. Walters. 1963. *Social Learning and Personality Development.* Holt, Rinehart and Winston.

Berkowitz, L. 1965. Some aspects of observed aggression. *J. Pers. and Soc. Psych.* 2:359-69.

———. 1971. Sex and violence: We can't have it both ways. *Psych. Today*, Dec. 1971.

Berkowitz, L., and R. Geen. 1966. Film violence and the cue properties of available targets. *J. Pers. and Soc. Psych.* 3:525-30.

Bevan, W. 1977. Science in the penultimate age. *Am. Sci.* 65:538-46.

Bogart, L. 1972. Warning: the Surgeon General has determined that TV violence is moderately dangerous to your child's mental health. *Pub. Opin. Quart.* 36:491-521.

Cater, D., and S. Strickland. 1975. *TV Violence and the Child: The Evolution and Fate of the Surgeon General's Report.* New York: Russell Sage Foundation.

CBS Broadcast Group. 1977. *Learning While They Laugh: Studies of Five Children's Programs on the CBS Television Network.* New York: CBS Broadcast Group.

Children's Television Workshop. 1977. *CTW Research Bibliography.* New York.

Comstock, G., S. Chaffee, N. Katzman, M.

McCombs, and D. Roberts. 1978. *Television and Human Behavior.* Columbia University Press.

Comstock, G., and M. Fisher. 1975. *Television and Human Behavior: A Guide to the Pertinent Scientific Literature.* Santa Monica, CA: Rand Corporation.

Comstock, G., and G. Lindsey. 1975. *Television and Human Behavior: The Research Horizon, Future and Present.* Santa Monica, CA: Rand Corporation.

Consumers Union. 1976. *The Six Billion Dollar Sell.* Mount Vernon, NY.

Cook, T. D., H. Appleton, R. F. Conner, A. Shaffer, G. Tamkin, and S. J. Weber. 1975. *Sesame Street Revisited.* New York: Russell Sage Foundation.

Dienstbier, R. A. 1977. Sex and violence: Can research have it both ways? *J. Communication* 27:176–88.

Fernandez-Collado, C., and B. S. Greenberg. 1977. *Substance Use and Sexual Intimacy on Commercial Television.* Report #5. Mich. State Univ.

Feshbach, S. 1961. The stimulating versus cathartic effects of a vicarious aggressive activity. *J. Abnormal and Soc. Psych.* 63:381–85.

Ford Foundation. 1976. *Television and Children: Priorities for Research.* New York.

Franzblau, S., J. N. Sprafkin, and E. A. Rubinstein. 1977. Sex on TV: A content analysis. *J. Communication* 27:164–70.

Frueh, T., and P. E. McGhee. 1975. Traditional sex-role development and amount of time spent watching television. *Devel. Psych.* 11:109.

Gerbner, G. 1972. Violence in television drama: Trends and symbolic functions. In *Television and Social Behavior,* vol. 1, *Media Content and Control,* ed. G. A. Comstock and E. A. Rubinstein. U. S. Government Printing Office.

Gerbner, G., L. Gross, M. Jackson-Beeck, S. Jeffries-Fox, and N. Signorielli. 1978. *Violence Profile No. 9.* Univ. of Pennsylvania Press.

Hanratty, M. A., E. O'Neal, and J. L. Sulzer. 1972. Effect of frustration upon imitation of aggression. *J. Pers. and Soc. Psych.* 21:30–34.

Howitt, D., and G. Cumberbatch. 1975. *Mass Media Violence and Society.* Wiley.

Kaplan, R. M., and R. D. Singer. 1976. Television violence and viewer aggression: A reexamination of the evidence. *J. Soc. Issues* 32:35–70.

Katz, E. 1977. *Social Research on Broadcasting: Proposals for Further Development. A Report to the British Broadcasting Corporation.* British Broadcasting Corporation.

Kochnower, J. M., J. F. Fracchia, E. A. Rubinstein, and J. N. Sprafkin. 1978. *Television Viewing Behaviors of Emotionally Disturbed Children: An Interview Study.* New York: Brookdale International Institute.

Lefkowitz, M. M., L. D. Eron, L. O. Walder, and L. R. Huesmann. 1972. Television violence and child aggression: A follow-up study. In *Television and Social Behavior,* vol. 3, *Television and Adolescent Aggressiveness,* ed. G. A. Comstock and E. A. Rubinstein. U. S. Gov. Printing Office.

Lesser, G. S. 1974. *Children and Television: Lessons from "Sesame Street."* Random House.

Liebert, D. E., R. M. Liebert, J. N. Sprafkin, and E. A. Rubinstein. 1977. Effects of television commercial disclaimers on the product expectations of children. *J. Communication* 27:118–24.

Lyle, J., and H. Hoffman. 1972. Children's use of television and other media. In *Television and Social Behavior,* vol. 4, *Television in Day-to-Day Life: Patterns of Use,* ed. E. A. Rubinstein, G. A. Comstock, and J. P. Murray. U. S. Government Printing Office.

Reiner, E. M., et al. 1978. *FTC Staff Report on Television Advertising to Children.* Washington, DC: Federal Trade Commission.

Robertson, T. S., and J. R. Rossiter. 1974. Children and commercial persuasion: An attribution theory analysis. *J. Consumer Research* 1:13–20.

Rubinstein, E. A. 1975. Social science and media policy. *J. Communication* 25:194–200.

——— 1976. Warning: The Surgeon General's research program may be dangerous to preconceived notions. *J. Soc. Issues* 32:18–34.

Rubinstein, E. A., J. F. Fracchia, J. M. Kochnower, and J. N. Sprafkin. 1977. *Television Viewing Behaviors of Mental Patients: A Survey of Psychiatric Centers in New York State.* New York: Brookdale International Institute.

Rubinstein, E. A., R. M. Liebert, J. M. Neale, and R. W. Poulos. 1974. *Assessing Television's Influence on Children's Prosocial Behavior.* New York: Brookdale International Institute.

Schaar, K. 1978. TV ad probe snags on Hill; researcher ire. *APA Monitor* vol. 9, no. 6, 1.

Schramm, W. 1976. The second harvest of two research-producing events: The Surgeon General's inquiry and "Sesame Street." *Proc. Nat. Acad. Educ.,* vol. 3.

Schramm, W., J. Lyle, and E. B. Parker. 1961. *Television in the Lives of our Children.* Stanford Univ. Press.

Silverman, L. T., J. N. Sprafkin, and E. A. Rubinstein. 1978. *Sex on Television: A Content Analysis of the 1977–78 Prime-Time Programs.* New York: Brookdale International Institute.

Singer, J. L., ed. 1971. *The Control of Aggression and Violence.* Academic Press.

Social Science Research Council. 1975. *A Profile of Televised Violence.* New York.

Stein, A. H., and L. K. Friedrich. 1975. *Impact of Television on Children and Youth.* Univ. of Chicago Press.

Surgeon General's Scientific Advisory Committee on Television and Social Behavior. 1972. *Television and Growing Up: The Impact of Televised Violence.* U.S. Government Printing Office.

Tankard, J. W., and S. W. Showalter. 1977. Press coverage of the 1972 report on television and social behavior. *Journalism Quart.* 54:293–306.

Tannenbaum, P. H. 1972. Studies in film- and television-mediated arousal and aggression: A progress report. In *Television and Social Behavior,* vol. 5, *Television Effects: Further Explorations,* ed. G. A. Comstock, E. A. Rubinstein, and J. P. Murray. U. S. Government Printing Office.

U. S. Commission on Civil Rights. 1977. *Window Dressing on the Set: Women and Minorities in Television.* Washington, DC.

Ward, S. 1972. Effects of television advertising on children and adolescents. In *Television and Social Behavior,* vol. 4, *Television in Day-to-Day Life: Patterns of Use,* ed. E. A. Rubinstein, G. A. Comstock, and J. P. Murray. U. S. Government Printing Office.

Ward, S., D. B. Wackman, and E. Wartella. 1975. *Children Learning to Buy: The Development of Consumer Information Processing Skills.* Cambridge, MA: Marketing Science Institute.

Watt, J. H., and R. Krull. 1977. An examination of three models of television viewing and aggression. *Human Communications Research* 3:99–112.

Zill, N. 1977. *National Survey of Children: Preliminary Results.* New York: Foundation for Child Development.

"What with the primary mental ability test and the differential aptitude test and the reading readiness test and the basic skills test and the I.Q. test and the sequential tests of educational progress and the mental maturity test, we haven't been learning *anything* at school."

"The state of the art of commercial children's television proves that the nation's children are not as important as the bottom line."

Children's TV: Sugar and Vice and Nothing Nice*

by *PEGGY CHARREN*

TELEVISION TODAY IS a four-billion-dollar industry. It is Beethoven and Batman, history and hysteria, creative entertainment and mindless mayhem. But above all, television in this country is big, big business. And children are a disproportionate part of that business. They are used, misused, manipulated, and misdirected by an industry that regards two-to-eleven-year-old children as a product to be sold to the highest bidder.

Few of our young people can remember life without television. The medium has grown up along with them. Over the last thirty years, television has grown from a novelty, a luxury for the wealthy, to become a staple in almost 98 percent of all American homes. Children today spend more time watching television than they spend in the classroom, or in any activity except sleep. By the time a child reaches age eighteen, he has spent two full years of his life staring at a small screen.

Although only 15 percent of a child's viewing time takes place during daytime hours on Saturdays and Sundays, the networks schedule hour after hour of what a recent Michigan State University study has called "the most violent and most deceitful time block of programming on television." In addition, a considerable portion of a child's TV viewing takes place during after-school hours, when independent and UHF stations recycle outdated situation comedies, westerns, and quiz shows to attract young viewers.

In the late 1960s, animated programs shifted from the standard Mickey Mouse and Donald Duck cartoons to series featuring monsters, superheroes, and science-fiction creatures. It is not uncommon for characters to resort to murder, bombings, car chases, and shootings to extricate themselves from sticky situations. And if all else fails, there's always the last resort: mysterious death rays!

These antisocial behavior patterns are often combined with racial and sexual stereotypes. The world children watch on television is peopled primarily by white American males, age eighteen to thirty-five. Women are more often witches than workers; blacks sing and dance; Orientals are villains; and the elderly are victims.

The commercial broadcaster has no incentive to develop innovative, age-specific programming for children as long as ratings is the name of the game. In the early days of television, programs were the bait used to sell TV sets. Now that more people in this country have a television set than have indoor plumbing or refrigerators, programs are the bait used to attract audiences to the advertising messages.

Television advertising to children has evolved into a complex, highly sophisticated industry. In 1939, $300,000 was spent on radio advertising to children. Today, the two-to-eleven-year-old market is the object of a $400,000,000-a-year advertising assault, with ads for toys, candy, cereal, record offers, amusements, and fast-food chains. Advertisers obviously have not made this kind of investment to attract nickels and dimes from a child's allowance. They recognize the persuasive powers of children as surrogate salesmen. If a

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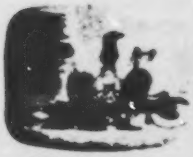
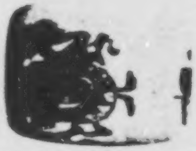
A Sugar Bath for Johnny's Teeth

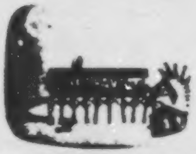
Printed below is a photographic version of a thirty-second ad for Life Savers which appeared on WCBS-TV in New York. The comments below the ad are those of Joan Gussow, head of the nutrition department at Columbia Teachers' College.



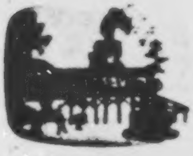
1. MUSIC MAN SINGS: Life Savers. Life Savers. Fun to eat. Super flavors can't be beat.



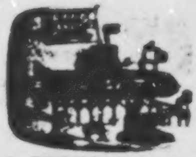
2. CHORUS SING: Hey Life Savers.



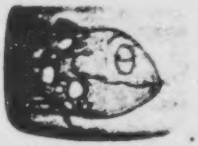
3. MAN SINGS: Super taste and super rolls.



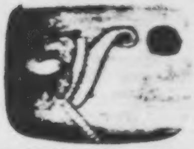
4. 22 flavors, 22 holes.



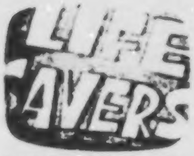
5. CHORUS SING: Hey Life Savers.



6. MAN SINGS: Suck 'em slow. Or suck 'em fast. They're fun on your tongue and made to last.



7. CHORUS SING: Hey Life Savers. Now Life Saver's on a stick.



8. Life Saver Lollipops...fun to lick. Hey Life Savers. (FADES)

"A witty and wonderful commercial, selling a product which kids would be better off without. Sucking one Life Saver after another, bathing one's teeth with sugar over an extended period of time ('They're fun on your tongue and made to last') is practically guaranteed to produce cavities. The '22 holes' are probably what parents will find in their children's teeth if they buy them the product."

child doesn't have the resources to buy a product himself, advertisers know that he has ways of getting Mom and Dad to buy it for him. As an Oscar Mayer executive puts it:

> "When you sell a woman on a product and she goes into the store and finds your brand isn't in stock, she'll probably forget about it. But when you sell a kid on your product, if he can't get it, he will throw himself on the floor, stamp his feet and cry. You can't get a reaction like that out of an adult."

During a single week, the average child will see almost three thousand commercial messages; that's five hours of advertising every week for the nation's 35 million children. There are more commercials on children's TV than on adult prime time.

No wonder the issue of selling to children has become a matter of intense concern to all those who care about the health and well-being of children. Many people believe that because children are neither able to distinguish fact from fantasy, nor understand the functions of the marketplace, advertising to children is inherently misleading and unfair. Dr. Richard Feinbloom, Medical Director of the Family Health Care Program of Harvard Medical School, expressed this opinion in a statement to the Federal Trade Commission:

> "An advertisement to a child has the quality of an order, not a suggestion. The child lacks the ability to set priorities, to determine relative importance, and to reject some directions as inappropriate."

SUGAR IN THE MORNING

Almost half of the advertisements directed to children are for heavily sugared foods. Less than 2 percent of the food ads are for milk, fruit, or vegetables. Candy, junk food, and supersweet cereals are marketed to children as nutritious, delicious, and fun to eat. Some cereals advertised as appropriate breakfast choices contain so much sugar, more than 50 percent, that nutritionist Jean Meyer has suggested they be relabeled as "imitation cereal" and placed on the candy counter. Pediatricians, dentists, and even the FDA state that sticky sugar between meals causes cavities, yet Mars, Inc. markets Milky Way to children, with the oft-repeated slogan, "At work, rest, or play,—all day, Milky Way." Do the executives of Mars, Inc. encourage their own children to nibble these sticky snacks at any hour of the day, or do they carefully teach the facts of dental life to their vulnerable offspring?

"Some cereals advertised as appropriate breakfast choices contain so much sugar, more than 50 percent, that nutritionist Jean Meyer has suggested they be relabeled as 'imitation cereal' and placed on the candy counter."

When they are not sweet-talking the young, TV's admen are busy turning the living room into a toy store. The TV commercial is the answer to a toy maker's dream. It affords the opportunity for visual demonstration, loud music, slow motion, fast action, engines whining, and babies crying. Armed with market research, pretested packaging, and program tie-ins, the toy salesman appears early and often during the pre-Christmas season. There was a time when toys were inexpensive, simply made, and related to the developmental needs of the child. Now the pressure to create an effective TV commercial affects the design of toys. A rag doll looks dead on television, but the doll that walks, talks, blows bubbles, and burps is a star attraction in a thirty-second drama. Despite the disclaimers "batteries not included" or "each item sold separately," a child is often disappointed to find that Barbie doesn't come with a fur coat and four friends, or that the Hot Wheels race-car set doesn't really look that much like Indianapolis after all.

Toy commercials accounted for 84 percent of all children's advertising during the after-school hours on a New York City station in November,

DEPARTMENT OF BUSINESS WISDOM

"To understand Cuba it helps to understand Mohitos. They have these drinks in Cuba. They call them Mohitos. Rum. Soda. Sugar. Lime juice. A sprig of mint. Everyone drinks them.

"It changes everything. Two or three Mohitos and you begin to understand. You begin to see more clearly. Yes, Cuba is a communist country. But laid back. Very laid back."

—Sally Quinn
journalist

1975. *Broadcast Advertisers Report* calculates that manufacturers of toys, games, and hobbycrafts spent about $32,866,000 on network advertising in 1975, nearly half of it directed to young viewers on Saturday and Sunday morning programs. The proliferation of licensed toys with TV tie-ins creates a boomerang effect. A program like "S.W.A.T." spurs a demand for S.W.A.T. action figures, which in turn serve as an ever-present reminder to watch the heroes on the tube.

Until recently, the broadcasters' Code of Good Practice permitted pills to be pushed to youngsters, pills that said on the back of the bottle, "Keep out of reach of children," because in overdose, they would put children into coma or shock. It was not until Action for Children's Television (ACT) petitioned the Federal Trade Commission to prohibit the selling of vitamins directly to children that the industry took action.

Hudson Pharmaceuticals ignored the Code ban in an attempt to market Spiderman vitamins, using the comic book hero Spiderman to endorse the special qualities of the pills. (Hudson is owned by Cadence Industries, which also owns Marvel Comics.) In response to a complaint from ACT, the FTC issued a consent order prohibiting the company from selling vitamins to child audiences.

In another illustration of corporate disregard for the vulnerability of childhood concerns, WDCA, an independent TV station in Washington, D.C. In 1975, during the two weeks before the Fourth of July, that station scheduled fifty-four commercials promoting the sale of fireworks. The manufacturer of the fireworks had arranged for all these sales pitches to be broadcast on popular children's programs, including "Bugs Bunny," "Bozo's Circus," "Gilligan's Island," and "Superman." Complaints from the American Academy of Pediatrics convinced the broadcaster to cancel the potentially dangerous campaign.

CHILDREN FOR MARKET

In defense of self-regulation, the television industry argues that outside regulation is an unnecessary imposition and would result in extraordinary expenditures. Industry and government talk a lot about the costs of regulation—in time, money, energy, and paperwork. But the real issue is the cost of no regulation. The state of the art of commercial children's television proves that self-regulation does not work, that left to its own devices, business does not make the right decision; that the nation's children are not as important as the bottom line.

"In a typical Saturday morning of cartoon shows, an animal is more apt to have a speaking part than a black."

The costs to society will be enormous if we continue to treat two-to-eleven-year-old children as a market to be captured. Some of the costs are obvious: poor dental health and nutritionally disastrous food habits. The toll in dental bills has reached a staggering $5 billion annually. Dentists recognize that the single biggest threat to dental health is sugar. And yet television continues its super-sweet sales pitches hundreds of times a week.

Some of the costs of inaction are more subtle. What are the effects on a child's perceptions of society when he is constantly exposed to racial and sexual stereotypes? In the world of television, capable, self-assured, ruggedly handsome males predominate in the leadership roles. Women, in contrast, are often shown as weak, insecure, scatter-brained, and submissive. In a typical Saturday morning of cartoon shows, an animal is more apt to have a speaking part than a black.

What are the effects of incessant exposure to violent interaction on television? Are children learning that violence and aggression are acceptable solutions to problems? If it works for their heroes, why not for them? What is the effect of violence on people's perceptions of real-life violence and danger? Drs. George Gerbner and Larry Gross of the Annenberg School of Communications have found:

> "heavy viewers significantly overestimated the extent of violence and danger in the world. Their heightened sense of fear and mistrust is manifested in their typically more apprehensive responses to questions about their own personal safety, about crime and law enforcement, and about trust in other people."

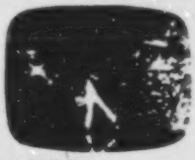
What are the results to society of an atmosphere that encourages materialism and consumption in children at a very early age? With all the sophistication that Madison Avenue can muster, television advertisements are beamed to children

Taking Candy to a Baby

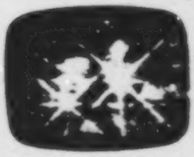
The following thirty-second ad for Starburst fruit Chews appeared on WNBC-TV in New York. Again **Joan Gussow** comments below.

1. CHORUS SING: You get a burst of fruit flavor from Starburst Fruit Chews.

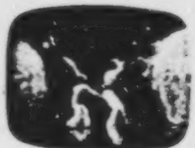
2. You get a burst of fruit flavor on the very first chew.



3. (MUSIC)



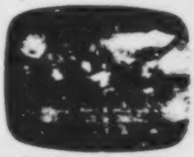
4. You get a burst of fruit flavor with orange, lemon, strawberry too.



5. A burst of fruit flavor from the very first chew.

6. Starburst Fruit Chews.

7. A burst of fruit flavors



8. from the very first chew...

9. (MUSIC)

"It's hard to be against candy ads, since candy is expected to be sweet and it's a confectionary by definition. It's just that the idea that you have to sell candy to kids is somehow ridiculous. On the world of Saturday morning TV, where almost everything which isn't a toy is sweet and gooey, there is an overkill of candy ads. People use the phrase 'like taking candy from a baby' to indicate that something is easy but immoral. On nutritional grounds, I'd suggest that selling candy to a baby is equally easy and perhaps more immoral.

"Like many candy ads, this one tends to identify candy with something wholesome, in this case fruit. I've seen candy ads where a bag of peanuts turns into a candy bar; one company got in trouble for showing a glass of milk turn into a candy bar, implying that they were nutritionally equivalent. It also seems to me that a very young child might have trouble distinguishing 'fruit flavor' (i.e., flavoring chemical) from 'flavor from fruit' (i.e., fruit juice). Moreover, this kind of chewy candy is the most devastating in causing cavities."

who lack even the basic ability to tell where a program ends and an ad begins. Through commercials, children are led to believe that unless they own a certain toy they won't be happy; that there is something intrinsically "better" about a cereal which comes with a prize in the box; that they can actually buy a device which will make them bionic. We're raising a new generation of children who know Peter Pan only as peanut butter, and think Mother Nature is a middle-aged lady who sells margarine. Although it is no longer permissible to exhort a child to be "the first kid on your block" to own a certain product, advertisers still aim at a child's sense of security and worth in ads like the one for a footwear company that promised, "Wear our sneakers and you'll never be lonely again."

Advertisers don't market moderation. They don't suggest that a particular toy may be too expensive for the family budget. They don't warn that too much candy can lead to cavities or weight problems. They don't volunteer the information that sweet cereals do not contribute to a balanced, nutritious diet. Advertising to children has little educational value. It is there to encourage them to acquire, not inquire.

American society historically has provided special protection for its children: child labor laws, restrictions on the legal drinking age, and laws governing the ability of minors to enter into contracts. Until the regulatory agencies act to protect children from the TV marketplace, broadcasters must exercise restraint and responsibility in program practices directed to children. At present, the industry, by both its actions and inactions, is not responsive to the social and human needs of developing children. ☐

Who Is "ACT"?

Action for Children's Television (ACT) is a nonprofit, national consumer organization, based in Newtonville, Massachusetts, working to improve broadcast practices related to children. Through legal action, education, and research, the group is trying to reduce violence and commercialism and to encourage quality and diversity on children's television.

ACT's activities include petitions and complaints to regulatory agencies, maintenance of a reference library and speaker's bureau, annual conferences on various aspects of children's television, and distribution of materials to parents, physicians, teachers, and industry. ACT publishes a quarterly newsletter, sponsors research studies, and currently is preparing a series of handbooks on specialized areas of children's programming.

ACT's accomplishments include successful lobbying to reduce weekend children's advertising time by 40 percent, eliminate vitamin pill advertising on children's programs, and eliminate "host" commercials. (No longer can the children's favorite performers act as salesmen for a sponsor's product.)

ACT has a paid staff of ten, over a hundred volunteer representatives, and fifteen affiliated groups across the country. ACT is funded by members and by foundations, including the Ford Foundation, the Carnegie Corporation of New York, and the National Endowment for the Arts. For more information, contact ACT at 46 Austin Street, Newtonville, Mass., 02160.

THE GLUTTONY OF THE FORTUNE 500

"Unbridled growth of nation's corporate giants endangers U.S. economy. Companies in Fortune 500 list increase sales by 93.1% past five years to $971 billion. Hike assets by 61.7% to $736.8 billion. Improve net income by 110% to $49.4 billion. Gross National Product grows 59.1% to $1.7 trillion in same period. Civilian work force expands 14.5% to 94.8 million while employment in Fortune 500 companies grows mere 3.6% to 14.8 million (from 14.3 million in 1971). GPR predicts number of 'shotgun' corporate marriages to rise over next five years as result of Big Business muscle. Forced mergers to be sole route to survival."

—The Gallagher Presidents'
Report, May 10, 1977

Compromise in commercials for children*

In the 'kidvid' war, there is a way for both sides to win

Scott Ward

The Federal Trade Commission's "kidvid rule" is the heaviest attack to date on children's television advertising. In the recent war between consumer activists and regulatory agencies, on the one hand, and the TV advertisers, on the other, however, the real issues underlying the various charges against TV advertising for children are far from clear-cut, says this author. He points out that both sides of the controversy are adopting a political-legal approach that involves a costly and protracted battle, and he suggests a more rational alternative using research-based educational methods.

Mr. Ward is associate professor of business administration at the Harvard Business School and senior research associate at the Marketing Science Institute. In addition to his research on marketing and children, he has published over 50 articles in several research areas. His special interest is public policy and regulatory impacts on marketing practice. His forthcoming book, *Cases in Consumer Analysis* (Prentice-Hall, Spring 1979), contains cases based on the course he developed at Harvard on consumer behavior.

For some years now, the effects of television advertising on children have caused a great deal of controversy. While the questions have particularly concerned food and toy advertisers, who devote approximately $400 million a year to television advertising during children's prime viewing times, the issue suggests some broader implications for resolving conflicts among marketers, consumer groups, and regulatory agencies.

Under the stewardship of three successive chairmen of the Federal Trade Commission (Miles Kirkpatrick, Lewis Engman, Calvin J. Collier, and Michael Pertschuck), the subject of advertising and children has been promoted to center stage of the FTC's activities. Since the early 1970s, the commission has brought cases against advertisers, charging them with deceptive advertising to children, but of the Trade Regulation Rules promulgated in this area, the most comprehensive and potentially devastating to marketers is the recently proposed "kidvid rule," which would:

1. Ban all advertising to children on television at times when children in a particular age range comprise a certain percentage of the audience—possibly 20%.
2. Ban advertising of products that contain over a set amount of sugar, by wet or dry weight.
3. Require advertisers to sponsor health and/or nutritional disclosure messages in proportion to the amount of food advertising that is directed to child audiences.

The kidvid rule comes at a time when passions on both sides run deep, and when research evidence, while growing, is still far from conclusive. It also comes in the midst of broad political and social currents that have mixed implications. For example,

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*Scott Ward in Harvard Business Review, vol. 56, November–December 1978: 128–136. Reprinted with permission of the Harvard Business Review, Boston, Mass. 02163. "Compromise in Commercials for Children" by Scott Ward (November–December 1978). Copyright 1978 by the President and Fellows of Harvard College; all rights reserved.

while the Carter administration has proclaimed the goal of lessening federal regulation in the day-to-day life of citizens, there are countervailing trends of concern about the family (some allege that advertising causes intrafamily conflict) and about nutrition and health (some allege that the products advertised to children pose a health threat).

My position is that it is possible for business and government to avoid the long and costly regulatory and legal battles that are currently shaping up over the kidvid rule. A compromise solution will require that we ignore the extremists on both sides, who will accept nothing short of either a total ban on advertising to children or, on the other side, no movement from the status quo. The extremists argue from positions rooted in personal values, and all the arguments and empirical data are useless against entrenched value positions. But if the FTC lawyers and consumer groups can see that changes aimed toward the goals of the rule can accomplish their objectives, and if businessmen are willing to acknowledge the desirability of compromise, then perhaps the issue of advertising to children can be put to rest.

In this article, I review some prominent landmarks in the kidvid issue, suggest what I feel are the central issues and research findings in this area, and discuss three possible models for resolution of the conflicts embodied in the kidvid rule.

Landmarks in kidvid

Americans have long expressed concern over television's effects on children, but the real depth of that concern is hard to assess. For example, while most Americans express concern in opinion polls about television violence, programs with aggressive themes are among the top-rated. And Raymond A. Bauer and Stephen A. Greyser found that, when prompted, people complain about advertising in general, but it is not a major concern when pollsters do not prompt them to respond.[1]

Polls are similarly murky about public attitudes toward advertising to children; some polls indicate that it is a uniquely highbrow issue, drawing its support from an elite band of people who are distinguished by their high social status as well as by their concern for others. It does seem safe to conclude that there is some latent support among the larger population for the vocal consumer groups on this issue—that a tip-of-the-iceberg phenomenon exists here. Regardless of the degree of popular support, however, issues involving advertising and children, and children's health, are politically quite appealing, fostering legislative and regulatory agency attention.

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[1] See Raymond A. Bauer and Stephen A. Greyser, Advertising in America: The Consumer View (Boston: Division of Research, Harvard Business School, Harvard University, 1968).

The first forays in the battle were sounded by Robert Choate, who is now chairman of the Council on Children, Merchandising and Media, a consumer group based in Washington, D.C. He has long expressed concern about the nutritional health of Americans. He discovered that legislators were much more responsive to arguments about advertising to children than they were to arguments about the nutritional health of children. Choate was joined by Action for Children's Television (ACT), which expanded its original concern with the quality of programming for children to encompass advertising and products aimed at child audiences.

From the original concern of the early 1970s about the nutritional value of breakfast cereals (and, subsequently, the advertising for these products), attention shifted to concerns about vitamin advertising to children, which was voluntarily withdrawn by industry.

FTC action

A few years ago, the FTC issued a trade regulation rule (TRR) which would have banned advertising to children that contains premium offers packaged with the product. But the FTC withdrew the TRR when research evidence indicated that children obtain just as much information about products in 30-second TV advertisements, whether premium offers are included or not. In addition, the political climate seemed to favor withdrawing the proposed TRR, since a vigorous battle appeared to be imminent.

Toy advertisers have so far been relatively unscathed by the battles. While consumer groups frequently express concern about the extent to which children can understand claims in toy advertising (and product disclaimers), the debate around food advertising focuses as often on the products themselves as on the advertising for them. Such attacks on the products themselves do not occur so frequently regarding toys.

The Federal Trade Commission has responded to consumer interest in children's television with some initiatives of its own. Since the 1972 Hearings on Modern Advertising Practices, chaired by Miles Kirkpatrick, television advertising's impact on children has been a center of debate. Following its traditional case-by-case approach, the FTC charged the Wonder Bread Division of International Telephone and Telegraph Corporation with misleading children by visual and audio representations that the product "helps build strong bodies 12 ways."

More recently, however, the commission has followed its chief alternative course of action in proposing TRRs to modify advertising practices affecting children. While the TRR on premium advertising has been withdrawn, the kidvid rule represents a much more comprehensive proposal and one with a great deal of staff time and effort invested; hence, no withdrawal of it is likely, in spite of a legislative maneuver to withhold the FTC's appropriation if the agency should attempt to ban advertising for any food found unsafe for human consumption—a move that is intended to block the kidvid rule.

Industry response

For their part, advertisers who spend much of their budgets to reach child audiences have followed what can best be described as a policy of drawing a line and then backing away from it, or, more accurately, compromising without admitting it. The lack of a unified and effective industry response probably reflects the diversity of advertisers who promote their products to children.

At first glance, it appears that the major advertisers are manufacturers of food and toys, who clearly have different perspectives and approaches to the problem. However, among food advertisers there are widely divergent views and approaches, owing to different product characteristics.

For example, while consumers may feel that sugar on or in cereals and sugar in snack foods such as candy bars are similar in their "bad" implications for nutrition and dental health, the fact is that the implications for most diets can be quite diverse. Breakfast cereal advertisers do not want to shoulder the charges leveled at snack food advertisers, any more than manufacturers of candy such as chocolate bars want to shoulder the charges leveled at such snack foods as cakes or other products in the generic category of snack food, into which chocolate manufacturers are unwillingly put.

In any case, the various companies and trade associations have got together in self-regulation—most notably in the guidelines offered by the Children's Advertising Review Unit (CARU) of the National Council of Better Business Bureaus and in the code of the National Association of Broadcasters (NAB). Both efforts offer detailed specifications for advertisements directed at children.

Those who favor federal regulation have leveled various charges at the self-regulatory mechanisms. They are said to lack timely enforcement, to involve standards that are unevenly applied (research on the effects of problem commercials is not routinely conducted on children themselves but instead on what adult judges feel the effects on children are). Other critics note that the NAB code applies to only about 60% of U.S. television stations.

Whatever the charges, there is little doubt that advertising addressed to children is vastly different now than it was even a few years ago. Considerably more care is taken in preparation of such advertising. Many advertisers now use pilot commercials to test the accuracy of children's perceptions as well as simply to test for recall. There is also less commercial "clutter," since advertising during children's prime viewing times has been reduced (according to the NAB code) to nine minutes an hour.

These changes, and the lack of attention to them, explain why I feel that business has compromised without saying so. Why, then, has the controversy continued, culminating in the kidvid rule? Some of the criticisms of the self-regulatory mechanisms are at least partially valid. But it is also true that marketers to children have not effectively publicized their efforts toward compromise by self-regulation.

There is a more pervasive reason, however, why self-regulation has not stemmed the tide. The problem is that the NAB code and the CARU guidelines are essentially a series of don'ts applying to advertising to children. First, such negatives are unappealing from a business perspective because they imply restraint and they raise questions about what happened before the don'ts. Second, without extensive and costly research on children, it is difficult to always demonstrate that the forbidden practice—the don't—actually does not occur in a given commercial. One cannot prove the null hypothesis that an effect does not occur.

Basic issues

Against this backdrop of consumer charges, FTC actions, and industry self-regulation initiatives, the real issues are blurry, owing to their sheer diversity and complexity.

A survey sponsored by the National Science Foundation covered marketers, consumer groups, and regulators and reviewed more than 250 research studies in an attempt to specify and study the central issues.[2] The foundation discovered that respondents' concerns centered chiefly on the effects of the following:

1. Ability to distinguish commercials from program materials.
2. Format and audiovisual techniques and children's perceptions of commercial messages.
3. Source effects (the impact a person presenting an ad has on a buyer and self-concept appeals).
4. Premium offers.
5. Violence and unsafe acts.
6. Volume and repetition.
7. Consumer socialization (how children learn consumer skills).
8. Parent-child relationships.
9. Proprietary medicine advertising.
10. Food advertising.

These issues boil down to three major areas. The first pertains to children's cognitive processing of commercials—that is, their patterns of selecting, interpreting, and evaluating information in commercials. Issues 1 through 6 fall in this area. The next two issues (7 and 8) pertain to advertising's impact on the family. Do children and parents argue in harmful ways about advertising-generated purchase requests or is there instructive discussion? Do parents mediate the effects of advertising on children? Finally, the last general area pertains to advertising for food and over-the-counter medicine products (issues 9 and 10).

The issues are diverse, but they are similar in their extraordinary complexity. Moreover, the evidence available from research cannot simply supply a solution, partly because the issues are confounded with personal values, rendering empirical information irrelevant, partly because the research is not conclusive. But there are some suggestive findings.

Complexity of the rule

A key issue is whether the purpose of consumer groups in general, and the kidvid rule in particular, is to regulate advertising to children or the products themselves. Some feel that banning advertising of sugared products, such as breakfast cereals, will ultimately reduce or even eliminate the consumption of such products.

Critics of the kidvid rule point out that cigarette consumption has actually increased since the ban on TV advertising; they also point out that per capita sugar consumption has changed little during this century—before and after the advent of television—and that the proliferation of presweetened cereals has resulted from intense brand competition in the industry as manufacturers have sought to meet demand among various market segments.

A second complexity in the kidvid rule stems from the facts that children watch at all hours of the broadcast day and that children's abilities to evaluate various advertising claims are clearly age-related. While the share of audience consists mainly of 2- to 11-year-old children on Saturday mornings, the weekend daytime hours account for only 16% of total weekly television viewing among children. The hours from 4:30 P.M. to 11:00 P.M. account for more than half their average weekly viewing.[3]

Regarding age relationships, the kidvid rule proposes banning advertising during times when preschool children comprise a certain percentage of the total audience. Aside from its impracticality, the proposal is unappealing because even young children's viewing times are very diverse and because it might restrict advertising for products not aimed at child audiences at all.

A third point that makes the kidvid issue inordinately complex stems from where the burden of proof lies. Must industry demonstrate the lack of validity in the FTC charges, or does the burden lie with the FTC to prove the charges alleged in the rule? One industry observer has expressed the opinion that the side that has the burden of proof will have a very difficult time.

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[2] Richard Adler, Gerald Lesser, Bernard Friedlander, Thomas Robertson, John Rossiter, and Scott Ward, *Research on the Effects of Television Advertising on Children* (Washington, D.C.: National Science Foundation, 1977).

[3] A comprehensive discussion of children's television viewing patterns is in Richard Adler et al., *Research on the Effects of Television Advertising*.

[4] Lawrence J. Gianinno and Paul A. Zuckerman, "Measuring Children's Responses to Television Advertising," unpublished paper (Chicago: Needham, Harper & Steers, Inc., 1977).

[5] Scott Ward and Daniel B. Wackman, "Children's Information Processing of Television Advertising," in *New Models for Mass Communication Research*, ed. P. Clarke (Beverly Hills, Calif.: Sage Publications, Inc., 1973).

[6] Charles Atkin, *Effects of Television Advertising on Children: Parent-child Communication in Supermarket Breakfast Selection*, Michigan State University, Department of Communication, Report No. 7, 1975.

[7] Joan Paley Galst and Mary Alice White, "The Unhealthy Persuader: The Reinforcing Value of Television in Children's Purchase Influencing Attempts at the Supermarket," *Child Development*, December 1976, p. 1089.

[8] Scott Ward, Ed Popper, and Daniel B. Wackman, "Parents Under Pressure: Influences on Mothers' Responses to Children's Purchase Requests," Working Paper (Cambridge, Mass.: Marketing Science Institute, August 1977).

[9] Andre Caron and Scott Ward, "Gift Decisions by Kids and Parents," *Journal of Advertising Research*, August 1975, p. 15.

[10] Scott Ward, Daniel B. Wackman, and Ellen Wartella, *How Children Learn to Buy: The Development of Consumer Information Processing Skills* (Beverly Hills, Calif.: Sage Publications, Inc., 1977).

A fourth area is perhaps the most complex of all: the evidence pertaining to the nutrition and healthfulness of products containing sugar. The FTC staff's proposal devotes some pages to discussion of these issues, but it seems that the evidence is far from clear. One nutritionist in a large food company recently observed that cariogenic properties of food depend not only on the product but on the particular form of the product (e.g., candies that stick to the teeth versus milk chocolate bars that melt in the mouth), a person's total dietary intake, individual acid levels in the mouth, and so on.

In one company's annual report, a comparative analysis shows that fruits contain more nutrients than milk chocolate products but that the latter are not devoid of nutrients. Moreover, fruits such as apples and dates contain more carbohydrates and nearly as many calories as three highly popular chocolate confections.

Research evidence

Although the health and dietary issues raised in the kidvid rule are beyond the scope of this article, it is possible to review some important behavioral research findings that pertain to the proposed rule.

A basic finding from research is that there are, not surprisingly, age-related differences in children's ability to fully evaluate and understand advertising messages. In spite of the self-evident nature of this proposition, research sponsored by a Chicago advertising agency claims to show that children "understand" commercials—they simply cannot verbalize their understanding.[4]

It is true that children's cognitive abilities develop before their verbal abilities, and the Chicago study does show that children can distinguish between, and recognize, commercial characters, as opposed to characters in television programs. But, in my opinion, this study does not indicate anything about understanding itself, which is a more complex phenomenon than the study measures.

Age-related differences are seen in children's behavior as well as in their verbal responses to questions. For example, in one study, children were unobtrusively observed watching television at home under normal circumstances.[5] Across many different viewing times, young children (5–7 years old) showed little change in attention when commercials replaced programs during routine television watching. Older children (8–12 years old) showed marked shifts in attention.

This finding is consistent with the hypothesis that young children do not discriminate as readily between programs and commercials as do older children. It is interesting that the Westinghouse Broadcasting Corporation stations have been experimenting with various audio and visual devices to signal a commercial's coming on. This practice is routinely employed in Europe during children's prime viewing times.

Although children do indeed ask their parents to buy products they see advertised on television, the extent and implications of such requests seem highly exaggerated. The critic's model holds that television advertising to children directly (and powerfully) affects children, and the resulting barrage of requests for advertised products does violence to domestic tranquility. Some early studies decried the fact that children in supermarkets often asked their parents to buy various breakfast cereals and sometimes put up a fuss if they did not comply.[6] Conversely, other research showed that children shopping with their parents ask for a wide variety of goods, many of them expressly designed for consumption by children, and some even advertised on television.[7]

In qualitative and follow-up laboratory research conducted at the Harvard-affiliated Marketing Science Institute, we found that the product itself and the child's recent behavior are vastly more important than TV advertising in a mother's decision to grant a child's request for a product.[8]

In other research, we found that parents actually encourage their children to use advertising media (particularly catalogs) as a means of finding out what they want for Christmas gifts.[9] And we have also found that parents can and do mediate the effects of advertising by using the opportunity afforded by commercials to help their children apply developing cognitive skills.[10]

At present, we are completing a study in which extensively trained mothers kept for one month a diary of all products one of their children requested each day. Other diaries were filled out daily to indicate products purchased in seven categories (e.g., cereals, candies, snacks) even if the child did not request purchase, and a diary was kept regarding children's television viewing. The results will provide some of the first data on children's actual asking behavior in the home environment (most studies to date have simply asked for reports of children's purchase requests and purchase frequency on rating scales).

New studies

A final area of research, and a provocative one, is beginning to indicate that even very young children (down to, and including, preschool children) can be taught relatively complex concepts and modes of reasoning. Other research we are completing is investigating the extent to which—and how—young children can be taught to carefully evaluate advertising messages.

In contrast to much "consumer education," which stresses admonitions about advertising, we are experimenting with helping children to understand (through school instruction) the concept of advertising, the nature of selling, the distinctions between programs and commercials, and how to select and use information in advertising.

Our applied research is based on recent findings in child development research. These findings extend the work of Jean Piaget, the Swiss psychologist most responsible for shaping our knowledge of children's cognitive development. It appears that the stages of cognitive development Piaget described are not inflexible barriers to children's learning. The "neo-Piagetians" are finding that learning among even young children can be greatly accelerated if one simply approaches them in terms most consistent with their cognitive abilities at a given time.

Modes of resolution

Given the state of affairs sketched to this point—the nature and development of the kidvid controversy, the complexities of the issues, and the research findings—how can businessmen, consumer groups, and regulators best resolve the issues? Some cynics say that it is impossible. There are models of industry-FTC cooperation, however, that have saved business and government the enormous costs involved in protracted litigation.

Unfortunately, the most prevalent model is still the "political-legal" approach. Businesses employ large legal staffs, and the FTC is populated mostly by lawyers, so it is natural for conflicts to follow the rocky road of initial investigations, pretrial negotiations, gathering of evidence and interviews of prospective witnesses, delays and postponement. This would then be followed by hearings before an administrative law judge, the district court, and finally the Supreme Court.

The battle signals for this approach have already been sounded for the kidvid rule. Industry groups have charged FTC Chairman Pertschuck with bias in the matter and have petitioned him to step aside; lobbyists have effectively appealed to the interests of congressmen and senators, who have attached the rider to the FTC appropriations bill mentioned earlier that would have the effect of stopping work on the kidvid rule.

The future scenario calls for extensive and expensive legal preparation, lengthy hearings on the rule, and ultimately, appeals through the courts. A central goal of the model seems to be delay. Whether or not one believes that industry can ultimately "win" the case, the costs will be enormous, the publicity bad, and the resulting environment very uncertain.

A second model might be called the "rational man" approach, reflecting not so much the assumption in economic theory that man is capable of optimal behavior as the underlying value of rationality one hopes to have in conflict resolution. Some in the research community—and, no doubt, on both sides of the kidvid rule—would opt for more research, or at least more reliance on current research implications, in deciding on the merits of the rule.

It is true that empirical research has come a long way in regulatory and legal proceedings, replacing at last the spectacle of psychiatric testimony, in which each side lines up an equal number of psychiatrists with exactly opposite opinions based on "clinical experience." (The net effect, of course, is that each bank of psychiatrists nullifies the other.) But the mechanisms for incorporating research findings into regulatory proceedings are far from well established. Moreover, behavioral science concepts and methods are far from perfect.

It is unlikely, then, that we will see the rational man model applied here; it is equally undesirable, in my view, that the political-legal approach should prolong the issues embodied in the kidvid rule.

The third approach, and the most desirable, in my view, calls for the parties to the controversy to seek compromise. Instead of a ban on advertising addressed to children, I have in mind using programmatic materials to teach children about advertising and products; instead of requiring advertisers to sponsor health or nutrition disclosure messages (which children would most likely misunderstand), I propose teaching children how to evaluate foods and establish good diets. Instead of trying to assert that young children "really can" understand advertising, I suggest a rigorous approach to fostering and actually demonstrating that understanding.

What I am suggesting is industry and government sponsorship of instructional programs—probably for use in schools—that would build on the emerging research and provide instruction for children in evaluating commercials and products. The model for this approach is "Sesame Street," which has enjoyed continued financial support and widespread acclaim primarily because the producers conducted "formative" research to determine how to most effectively teach children. This program also conducts ongoing evaluative research to report how well it is meeting objectives and to make changes when necessary.

Perhaps the single reason why many business initiatives concerning advertising and children have had little impact is that empirical data on effectiveness have been lacking. Initiatives such as Kellogg's nutrition commercials, Westinghouse Broadcasting's program-commercial differentiation techniques, and various companies' educational materials thus look like public relations efforts rather than serious attempts to deal with serious problems. It is not enough for advertisers to assert that "the schools should do it." Schools buy curriculum materials and textbooks, and curriculum designers supply the schools—and that is where corporate sponsorship of curriculum innovations such as these comes in.

If there were to be a national educational effort, such as I have sketched here, what would have to be the points of compromise to replace the proposed kidvid rule with this proposal?

The consumer group and FTC perspective would require flexibility regarding the rule itself. The goal would have to become a reasonable level of sophistication and information among child audiences regarding advertising and foods rather than rigid adherence to the goal of ultimate victory for the proposals in the kidvid rule.

Such a goal would require focusing attention on school-age children rather than on holding advertisers accountable for effects of advertising on even younger children, since school-age children are more active and acquisitive than younger children. I am not excusing wrong impressions that very young children may gain from watching commercials, but I am suggesting that parents have different concerns for their children at different stages. Education about commercials and products can and should effectively begin with the school-age child.

From an industry perspective, I am suggesting a more unified and demonstrable approach to compromise than has been the case so far. Advertisers must endorse the dual ideas that children should be able to evaluate advertising messages fairly and that it is desirable to cooperate in efforts to educate children toward that end and toward the goal of appropriate dietary habits.

This approach does not mean that advertisers must say that "sugar in any amount is bad," but it does suggest that advertisers should help to foster good dietary habits. It does not threaten brand competition through advertising for marketers to endorse the proposition that children should be able to evaluate effectively commercials designed to appeal to them and that children should form good dietary habits. Whether it is ultimately industry's responsibility to undertake such efforts seems moot at the moment, given the alternatives proposed in the kidvid rule.

One question remains. Who can get such a compromise proposal under way and how? Taking a cue from the diplomatic corps, somebody is going to have to signal somebody. But industry will have to be assured that efforts such as those proposed here will find a receptive audience at the FTC. Perhaps an industry trade association could propose sponsorship of the formative research for the educational programs; the return signal could be an expression of interest in the results from the FTC.

Industry should replace public relations programs with educational programs of demonstrated worth. The traditional political-legal approach to regulatory matters is a poor approach—it tarnishes the image of business and offers no sure outcome in the rapidly changing environment, even if some "favorable" court ruling obtains in the distant future. Compromises will be called for on both sides, but the goal should be educating children now rather than pursuing political-legal processes on a proposed rule that promises endless debate.

The Censorship of Violent Motion Pictures: A Constitutional Analysis*

Violence in motion pictures and television shows has recently become an issue in the courts and legislatures. For example, in Florida, a youth charged with murder offered the defense of temporary insanity resulting from watching television.[1] In California, a plaintiff in a tort action against a television network sought damages for injuries allegedly inflicted upon her by juveniles imitating a scene of brutality in a television drama.[2] In Chicago, the City Council in 1976 amended an ordinance[3] in order to set up a procedure for censoring violent motion pictures for audiences under eighteen years of age.[4]

The existence of the Chicago ordinance, plus the public concern over controversially violent media, necessitates an inquiry into the constitutionality of censoring violent motion pictures. Although the censorship of obscene motion pictures is constitutional if done by means of a system with procedural

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*Mary B. Cook in Indiana Law Journal, vol. 53, No. 2, 1977–1978: 381–398. Reprinted with permission of Indiana University, 502 East 4th St., Bloomington, Indiana. 47405.
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[1] The Indianapolis Star, Oct. 1, 1977 at 5, col. 1.

[2] Olivia N. v. N.B.C., Inc., 46 U.S.L.W. 2265 (Cal. App. 1977).

[3] CHICAGO, ILL., MUNICIPAL CODE § 155-1 to 155-7.4 (1969).

[4] *Id.*, at § 155.5. The amendments [hereinafter referred to as *Chicago Ordinance*] read in part:

> 155.1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted anywhere in the city, any motion picture, whether an admission fee is charged or not, without first having secured a permit therefor from the Superintendent of Police.
>
> 155.1 It shall be the duty of the Superintendent of Police to refuse to issue such permit if the motion picture, considered as a whole, is *harmful* [obscene] when viewed by children, as *defined herein*.
>
> The term "children" means any persons less than eighteen years of age.
>
> *"Harmful when viewed by children" means "obscene when viewed by children" or "violent when viewed by children," as those terms are defined below.*
>
> *A. A motion picture is "obscene when viewed by children" when taken as a whole it (1) to the average child, applying contemporary community standards, appeals to the prurient interest, (2) depicts or describes in a patently offensive way sexual conduct as defined herein, and (3) lacks serious literary, artistic, political, or scientific value. Each of these three elements shall be applied in terms of what the adult community judges is appropriate for children.*
>
> *B. A motion picture is "violent when viewed by children" (1) when its theme or plot is devoted primarily or substantially to patently offensive deeds or acts of brutality or violence, whether actual or simulated, such as but not limited to assaults, cuttings, stabbings, shootings, beatings, sluggings, floggings, eye gougings, brutal kicking, burnings, dismemberments and other reprehensible conduct to the persons of human beings or to animals and (2) which, when taken as a whole, lacks serious literary, artistic, political, or scientific value.*
>
> *Both of these elements shall be applied in terms of what the adult community, applying contemporary, standards, judges is appropriate for children.*

safeguards,[5] the Supreme Court has not decided whether violent motion pictures can be censored.[6] This note will examine whether traditional modes of First Amendment analysis – nonprotected categories of speech, balancing, and the current version of the clear and present danger test – can justify such censorship, and as an aid in deciding the legal issue of censorship, recent social science research on the effects of viewing violent media will be reviewed.

DEFINING VIOLENCE OUT OF THE FIRST AMENDMENT'S PROTECTION

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . .",[7] and "speech" includes motion pictures.[8] Although this phrasing of the first amendment sounds absolute, it has not been interpreted to protect all speech; some categories of speech, such as obscenity and fighting words, clearly lie outside of its protection.[9] Until recently, commercial speech[10] and group libel[11] were also considered unprotected. If violent movies could fit into a nonprotected category or be recognized as a new category of nonprotected speech, such media would be susceptible to censorship or other legislative control.[12]

Violence Outside Established Categories of Nonprotected Speech

It would seem that violent expression cannot be strained to fit into the two established categories of nonprotected speech, obscenity and fighting words. Obscenity is limited by the Supreme Court to "works which depict or describe sexual conduct,"[13] and the Court expressly declined to include violence within that category in *Winters v. New York*,[14] which struck down as void for vagueness a definition of obscenity and indecency that included "stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person."[15] In apparent recognition of this distinction between obscenity and violence, drafters of the Chicago ordinance provided separate definitions for movies which are "obscene when viewed by children" and for movies which are "violent when viewed by children."[16] Thus, violence does not fall within the nonprotected category of obscene speech.

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[5] Freedman v. Maryland, 380 U.S. 51 (1965); Time Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[6] The Supreme Court did review a case involving an ordinance permitting classification of violent movies as unsuitable for young persons, but decided the case on vagueness grounds. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). *See* text accompanying note 87 *infra*.

[7] U.S. CONST. amend. I.

[8] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[9] Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[10] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[11] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[12] If censorship of violent media is constitutionally permissible, the censorship process must include certain procedural safeguards. First, the burden or proving that the film is unprotected must rest on the censor. Although the State may require advance submission of films, the requirement cannot lend an effect of finality to the censor's determination. Only a judicial determinaion suffices to impose the final restraint. Thus, the censor, within a short specified period must either issue a license or go to court. In addition, the procedure must assure a prompt final judicial decision. Freedman v. Maryland, 380 U.S. 51 (1964).

The Chicago ordinance appears to include such sageguards. CHICAGO ORDINANCE, *supra* note 4, at § 155-5, 155-7.1, 155-7.2. The Superintendent of Police is the initial censor. If he refuses to issue a permit, a Motion Picture Appeal Board must review the decision within five days. If the Board affirms the Superintendent's decision, the Board must file with a court an action for an injunction within three days. Assuming that such filing will lead to a prompt judicial determination in which the Board must bear the burden of proof, *Freedman's* requirements are satisfied. *See* Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).

If movies trigger a physically violent reaction, perhaps they are "fighting movies," synonymous with nonprotected "fighting words" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[17] However, the fighting words exception to the first amendment stems from the need to avoid fights or insults hurled at policemen, and has little relevance to movie-watching, which involves no face-to-face confrontation or personal insultes.[18] The nonprotected category of fighting words thus does not accommodate the violence clasification either.

Violence as a New Category of Nonprotected Speech

Although distinct from existing nonprotected speech, violent expression may warrant recognition as a new category of nonprotected speech, particularly if such expression is of slight social value or devoid of ideas.[19] The ingredients of a nonprotected category of speech include:

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[13] Miller v. California, 413 U.S. 15, 24 (1973).

[14] Winters v. New York, 333 U.S. 507 (1948).

[15] *Id.* at 518. *Winters* invalidated § 1141(2) of the New York Penal Law entitled "Obscene prints and articles." A commentator notes that "*Winters* also struck in a subtle way at the rationale of obscenity regulation itself. . . . By containing the remedy, the Justices expressed doubt about the disease." Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 159 [hereinafte cited as Krislov].

[16] CHICAGO ORDINANCE, *supra* note 4, at § 155.5. *See* note 4 *supra*.

[17] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[18] The recent offensive speech cases make clear the narrow focus of the fighting words category of unprotected speech. Cohen v. California, 403 U.S. 15 (1971) reversed a conviction for disturbing the peace based on Cohen's wearing a jacket bearing the words "Fuck the Draft." Mr. Justice Harlan explained that the expression was not obscene, since not erotic, that it was not equivalent to fighting words, as it was "not directed to the person of the hearer" and no individual could reasonably have regarded the words as a direct, personal insult, that it was not a proper exercise of the police power to prevent a speaker from provoking a group to a hostile reaction, and that it was not a captive audience situation. The Court thus drew a line of constitutional protection around such expression. As a result, a very narrow category of "fighting words," limited to personal insults in a face-to-face confrontation which could trigger physical violence, remains nonprotected. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 8 (1974). Gooding v. Wilson, 405 U.S. 518 (1972), further emphasizes how narrowly drawn this category of speech must be. In *Gooding*, a statute using the terms "opprobrious words" and "abusive language" was deemed invalid for overbreadth, as the construction of these terms was not confined to fighting words.

[19] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly

> the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . *[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*[20]

To assess whether violent media lacks social importance, and is therefore outside first amendment protection, one must examine the policies or societal interests promoted by regulation of violent media. Relevant interests may include: (1) the prevention of antisocial conduct, (2) the unwillingness to advocate immoral behavior, and (3) avoidance of revolting public displays.[21]

The prevention of antisocial conduct is a primary interest underlying the regulation of violent expression, for antisocial conduct triggered by depictions of violence could culminate in overt, destructive, and criminal acts. Some members of the public apparently blame the media for murders and other crimes of violence.[22] However, proof of a causal connection should be required to remove the protection of the First Amendment,[23] and so far, con-

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without redeeming social importance" and thus "not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 484 (1957). A similar premise might be accepted with regard to violent expression.

[20] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added).

[21] These social interests are modeled on those posed as justifications for obscenity regulation. Notes one commentator in regard to obscenity:

> "Analysis reveals four possible evils: (1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values."

Kalven, *The Meta Physics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 4-5 [hereinafter cited as Kalven]. All such interests, when applied to obscenity, have come under fire from critics both on the Court and off. *See, e.g.*, Roth v. United States, 354 U.S. 476, 508-14 (1957) (dissenting opinion, Douglas, J., joined by Black, J.); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 497-99 (1970) [hereinafter cited as EMERSON]. Kalven, *supra*, at 4.

Kalven summarizes:

> It is hard to see why the advocacy of improper sexual values should fare differently, as a constitutional matter, from any other exposition in the realm of ideas. Arousing disgust and revulsion in a voluntary audience seems an impossibly trivial base for making speech a crime. The incitement of antisocial conduct . . . evaporates in light of the absence of any evidence to show a connection between the written word and overt sexual behavior."

Id. Nevertheless, the interests, even if not universally accepted in regard to obscenity, may become more compelling when applied to violent movies. As one commentator notes, "For every justification for restricting sex candor, precisely analogous arguments could be developed with respect to limiting flaunted violence." Krislov, *supra* note 15, at 159.

[22] *See, e.g.*, Washington Post, Aug. 4, 1976, § A, at 11.

[23] Critics of obscenity laws often point to the lack of empirical data to support the assumption that obscenity triggers antisocial conduct. EMERSON, *supra*, note 21, at 498. *But see* Paris Adult Theatre v. Slaton, 413 U.S. 49, 60 (1973). Although the Supreme Court has made it clear that it does not require such empirical proof for obscenity legislation, it does not necessarily follow that it will not require proof for the censorship of violent expression. The force of history no doubt makes it much easier for the Court to accept obscenity laws than to accept a whole new area of speech regulation without proof of the need for it.

clusive evidence of that causal connection is lacking.[24] Thus the interest espoused does not support the nonprotection desired.

The unwillingness to advocate immoral behavior is an interest apparently aimed more at thoughts than at conduct.[25] Promoters of this interest might be concerned with instilling negative attitudes in viewers by exposing them to destructive models on the screen.[26] In other words, those who oppose the media advocating violent behavior are concerned about putting *ideas* in viewers' minds. Yet the first amendment's protection is designed to protect "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion . . . ."[27] Thus, using this interest to avoid "bad ideas" would clash with the "marketplace of ideas" concept[28] and would be rejected.

However, if the impact on "character" could eventually produce a change in conduct, perhaps attempting to avoid advocating immoral behavior is not altogether specious.[29] Whereas the first interest discussed seeks to prevent immediate antisocial conduct, this second interest attacks gradually emerging antisocial behavior; again, substantiating evidence would make the argument more convincing.

The avoidance of revolting public displays may also seem a specious interest at first blush. As a commentator states in reference to obscene movies, "arousing disgust and revulsion in a voluntary audience seems an impossibly trivial base for making speech a crime."[30] Yet revulsion at sexual scenes on the screen may be of a lesser magnitude than revulsion at watching the dismemberment of a human being.[51] Depicting the brutal destruction of human beings for the sake of entertainment and commercial gain could strike too deeply at shared societal values. Whether governmental sanction of noninterference with such displays will cause harm to society may be an unanswerable question, but the specter of such harm may be enough to justify some regulation of grossly violent and brutal movies. Empirical research studying the effects of viewing violent media may help in deciding whether this and the preceding interests discussed are strong enough to justify setting up a new category of nonprotected speech.

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[24] *See* text accompanying notes 32 & 33 *infra*.

[25] EMERSON, *supra* note 21, at 499.

[26] Two social scientists comment:

> Some individuals who are opposed to the depiction of violence on television are not concerned chiefly with the possibility that the adult viewer will himself go out and shoot a neighbor or that the child who enjoys "Batman" will kick the family dog. Many critics of what they consider excessive programming of violence are well aware of the social constraints which usually keep children and adults alike from injuring each other often or seriously. They are more concerned with the attitudes which televisions may be inculcating and the emotional responses which it may be engendering. Specifically, they point to the fact that most television programs involving violence include a good guy or guys who, in the name of "my" country, "our" side, or law and order, inflict injury or death on the bad guys. . . . The result of being exposed to such attitudes, it is argued, is not particularly violence on the part of the viewer but the increased probability that he will support, condone, or justify aggression on the parts of his own police department or armed forces.

S. FESHBACH & R. SINGER, TELEVISION AND AGGRESSION 18 (1971).

[27] Roth v. United States, 354 U.S. 476, 484 (1957). Kingsley International Pictures v. Regents, 360 U.S. 684 (1959), makes it clear that a state cannot prevent the exhibition of a motion picture because that picture advocates an idea.

[28] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[29] Kalven, *supra* note 21, at 4. Mr. Justice Harlan seemed to rely on this gradual effect on conduct as a justification for obscenity laws. He stated in *Roth v. United States*, "[t]he State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." 345 U.S. at 502 (Harlan, J., concurring). *But see* EMERSON, *supra* note 21, at 499.

[30] Kalven, *supra* note 21, at 4.

A considerable number of studies on the effects of media violence on children now exist.[52] Some focus on television violence, others on motion pictures. Present knowledge on the effects of violent media is difficult to summarize, partially because of the quantity of studies, but primarily because interpreters of the same data often reach opposite conclusions.[53] It is difficult to

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[51] *See generally* New York Times, Mar. 7, 1976, § 2, at 15, col. 8; Feb. 27, 1976, at 21, col. 12.

[52] *See, e.g.*, A. Arnold, Violence and Your Child (1969); A. Bandura, Aggression: A Social Learning Analysis (1973); S. Feshbach & R. Singer, Television and Aggression (1971); J. Goldstein, Aggression and Crimes of Violence (1975); D. Howitt & G. Cumberbatch, Mass Media Violence and Society (1975); Violence and the Mass Media (O. Larsen ed. 1968).

As recently as 1970, a law journal writer remarked that "a few inconclusive studies have been undertaken to determine the effect of motion pictures on children" and cited only two studies which took place in the 1930's. Note, *Private Censorship of Movies*, 22 Stan. L. Rev. 618, 645 (1970). The two studies are H. Blumer & H. Hauser, Movies, Delinquency and Crime (1933); W. Healy & H. Bronner, New Light on Delinquency and Its Treatment (1936).

Since the writing of that 1970 note, volumes of studies on the subject have been published. In part, this publication of research was due to the work of the 1969 National Commission on the Causes and Prevention of Violence, and the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, which began in 1969 and completed its work in 1972. For the relevant research collected by the Commission, *see* D. Lange, R. Baker & S. Ball, 9 Mass Media and Violence (1969); 9A Mass Media Hearings (1969). *See* Surgeon General's Advisory Committee on Televisions and Social Behavior, Television and Growing Up: The Impact of Television Violence (1972); 5 Television and Adolescent Aggressiveness (1972). At the same time, behavioral scientists published results of studies collected or conducted independently of the government projects. *See, e.g.*, A. Bandura, *supra*; S. Feshbach & R. Singer, *supra*.

[53] One group of social scientists conclude that "[t]here is a clear and reliable relationship between the amount of violence which a child sees on entertainment television and the degree to which he is aggressive in his attitudes and behavior." Liebert, Davidson, & Neale, *Aggression in Childhood: The Impact of Television*, in Where Do You Draw The Line? (V. Cline ed. 1974) 119-20. Others declare that "the Mass Media do not have any significant effect on the level of violence in society." D. Howitt & G. Cumberbatch, *supra* note 52, at vii. Examples of a few well-known studies may help to reconcile these conflicting conclusions.

Albert Bandura has conducted several studies with very young children. *See, e.g.*, Bandura, *Influence of Models' Reinforcement Contingencies on the Acquisition of Imitative Responses*, 1 J. Personality & Soc. Psych. 589-95 (1965); Bandura, Ross, & Ross, *Vicarious Reinforcement and Imitative Learning*, 67 J. Abnormal & Soc. Psych. 601-07 (1963); Bandura, Ross, & Ross, *Imitation of Film-Mediated Aggressive Models*, 66 J. Abnormal & Soc. Psych. 3-71 (1963). His summary of one important study illustrates a social science laboratory experiment designed to test whether children will adopt aggressive behavior portrayed by adult models in various situations:

The first group observed real life adults . . . .

> In one corner [of the test room], the child found a set of play materials; in another corner, he saw an adult sitting quietly with a set of tinker toys, a large inflated plastic Bobo doll and a mallet. Soon after the child started to play with his toys, the adult model began attacking the Bobo doll.
>
> The second group of children saw a movie of the adult model beating up the Bobo doll. The third group watched a movie — projected through a television console — in which the adult attacking the doll was costumed as a cartoon cat. Children in the fourth group did not see any aggressive models; they served as a control group.
>
> At the end of 10 minutes the experimenter took each child to an observation room, where we recorded his behavior. . . . [W]e mildly annoyed each child before he came in.
>
> The observation room contained a variety of toys. Some could obviously be used to express aggression, while others served more peaceful purposes.

Bandura, *What TV Violence Can Do to Your Child*, in VIOLENCE AND THE MASS MEDIA, *supra* note 52, at 124-25. The study is Bandura, Ross & Ross, *Imitation of Film-Mediated Aggressive Models*, *supra*.

Two important findings resulted from this study. Children who had observed the aggression prior to being frustrated were more aggressive in their play than those who had not observed any adult aggression. Further, the aggressive play was imitative, modeled on the behavior the children had observed in adults, whether live or on film. The study is discussed in Siegel, *The Effects of Media Violence on Social Learning*, in Lange, Baker, & Ball, *supra* note 52, at 174-75.

Another study by Bandura utilized a five-minute film in which one man plays with attractive toys until another character, Rocky, aggressively takes the toys. Bandura, Ross & Ross, *Vicarious Reinforcement and Imitative Learning*, *supra*. A commentator announced to the three to five year old viewers that Rocky was the victor. Another film showed Rocky's aggressive behavior severely punished. After viewing one film, children were observed in a play session. Both Bandura studies illustrate "that young children imitate the specific acts of aggression they have observed. . . . This imitation occurs whether the dramatic presentation is realistic or fantasylike. Imitation is enhanced if the aggression brings rewards to the adult who is observed and minimized if the aggression brings punishment." Siegel, *supra*, at 276.

These conclusions appear definite. However, other social scientists argue that Bandura's findings are not relevant to actual violence outside of the laboratory setting, although Bandura is respected for his methodology. *See* D. Howitt & Cumberbatch, note 52 *supra*. Their whole book is devoted to illustrating how such studies are irrelevant to real life violence.

Not all studies focus on young children in play situations, however. Several studies have measured the aggression of college students who, after viewing certain films, believed they were delivering electric shocks to confederates. *E.g.*, Berkowitz, *Some Aspects of Observed Aggression*, 2 J. PERSONALITY AND SOC. PSYCH. 359-69 (1965); Walters & Thomas, *Enhancement of Punitiveness by Visual and Audiovisual Displays*, 16 CANADIAN J. PSYCH. 244-55 (1963). The films offered apparent justification or additional incentive for delivery of the shocks. However, critics are no more satisfied with this experimental design than with Bandura's:

> The major criterion of aggression employed in most of the studies is the delivery of a shock of high intensity to another student presumably as part of a learning experiment. . . . It remains a serious question whether the delivery of the shock really is analogous to an act of overt aggression. . . . If *E* [experimenter] asked the frustrated *S* [subject] to slap the other participant in the face or to whack him with a paddle we might not get the same reaction. Conceivably by setting up a complex situation in which *S* gets minimal feedback from his fellow player of distress and has every reason to believe that a faculty member of a college would not permit him to harm anyone seriously, the whole situation takes on a game-like atmosphere.

Singer, *The Influence of Violence Portrayed in Television or Motion Pictures Upon Overt Aggressive Behavior*, THE CONTROL OF AGGRESSION AND VIOLENCE (J. Singer ed. 1971) at 45-46.

Such criticisms may be unavoidable in any laboratory setting. Therefore, field studies may be more useful in proving whether violent media cause antisocial conduct. Feshbach and Singer made an effort to employ laboratory procedures in a field context. S. Feshbach & R. Singer, *supra* note 52. Their six-week study was carried out in the setting of three private schools and four boys' residential institutions. The subjects, adolescent boys, were required to watch television from one of two designated lists of programs. One list was an aggressive diet of shows, the other generalize from studies based on different concepts to ultimately reach a definition of aggression showing the relation between viewing media and the actual occurrence of crime.[58]

To date, empirical research paints a gloomy picture of unprovable conclusions. Behavioral science currently does not allow conclusive proof that violent movies precipitate crimes or cause serious harm to children in other ways. Empirical data does not disprove either possibility, and in some circumstances a tentative causal connection has been shown.[59] But limited, tentative conclusions from empirical research do not support creation of a new category of nonprotected speech.

Additional reasons exist for keeping violent movies within the scope of the first amendment. One reason is the lack of history or tradition of censoring violent media.[60] If anything, the appeal of war stories and the adventures of

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nonaggressive. Daily behavior rating forms were completed for each child by supervisors or teachers. Each aggressive act was rated, and personality inventories were also taken. (Methodological problems occurred, because some boys dropped out of the project and some rates were very inconsistent.)

The data collected revealed no significant effect on peer aggression scores in the private school population but showed marked effects in the boys' homes. "The significant decline in aggression toward peers in the boys exposed to aggression content in television and the increase in aggression in the boys exposed to the control diet constitute the most important finding in the study." *Id.* at 80-81. This result was interpreted to mean that an aggressive television diet provides "cognitive support," a coping function associated with aggressive fantasies. In other words, the vicarious imaginative activity entailed in observing aggressive content on television leads to a release of aggression. This resembles the "catharsis" hypothesis, which suggests that drive reduction from television or movie watching occurs and, therefore, that such viewing *reduces* real life violence. D. Howitt & G. Cumberbatch, *supra* at 32.

[58] Feshbch and Singer clearly utilized different underlying concepts from Bandura: Feshbach emphasizes fantasy and catharsis, while Bandura talks of observational learning and imitation. See text accompanying note 55 *supra*. Another problem is the measure of aggression, as the studies involve play situations and attacks on inanimate objects, with no demonstrated relation to overt aggression and actual assault on another individual.

> It remains an unanswered question whether aggressive play is at all the same as a direct assault upon another child. Indeed there is evidence that one of the characteristics of imaginative children is their capacity to engage in vigorous aggressive play quite comparable to the situation occurring in the Bandura type experiments. . . .
> It remains to be seen whether such play bears a direct relation to overt aggression.

Singer, *The Influence of Violence Portrayed in Television or Motion Pictures Upon Overt Aggressive Behavior*, THE CONTROL OF AGGRESSION AND VIOLENCE (J. Singer ed. 1971) at 38.

[59] The Surgeon General's Scientific Advisory Committee on Television and Social Behavior concluded that a causal connection does exist, finding:

> A preliminary and tentative indication of a causal relation between viewing violence on television and aggressive behavior, an indication that any such causal relation operates only on some children (who are predisposed to be aggressive), and an indication that it operates only in some environmental contexts. Such tentative and limited conclusions are not very satisfying. They represent substantially more knowledge than we had two years ago, but they leave many questions unanswered.

Id., *supra* note 52, at 18-19.

[60] *See* Winters v. New York, 333 U.S. 507 (1948); Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149 (1967).

The lack of a history of censoring violence is in contrast with the historical support for censoring obscenity. In *Roth v. United States*, Justice Brennan gave great weight to history as a cowboys and Indians point to a history in support of such violent tales. The 1950's produced crime comic book legislation, aimed at censoring or limiting distribution to minors of comics featuring crime;[37] however, that legislation does not support the Chicago ordinance inasmuch as the comic book laws were struck down by courts[38] relying on *Winters v. New York*,[39] the case which rejected an attempt to censor violent publications.[40] More recently, legislation censoring violent media was likewise rejected when an ordinance censoring movies harmful to children was held void for vagueness in *Interstate Circuit, Inc. v. City of Dallas*.[41]

Support for constitutional protection of violent media may also be drawn from the current erosion of traditional nonprotected categories of expression. For example, *New York Times v. Sullivan*[42] has been interpreted as signaling an erosion of the "two-level approach" to speech,[43] which creates two

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justification for excluding obscenity from constitutional protection. 354 U.S. 476, 485 (1957). Because libel laws and the crimes of blasphemy and profanity existed at the time the Constitution was ratified, speech falling within such offenses was intended to be outside of the protection of the first amendment. Although obscenity laws admittedly were not as well developed, obscene speech likewise was intended to be nonprotected, according to Brennan, who reasoned, "As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' . . . . Thus, profanity and obscenity were related offenses." *Id.* at 482-83.

This historical argument has been criticized by commentators and by a Justice sitting in the same case. *See, e.g.*, Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 2 ("Although it has been argued that the utterance of obscenity was a common-law crime, early instances are infrequent and, at best, ambiguous.") Justice Douglas wrote, "Unlike the law of libel, wrongfully relied on in Beauharnais, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment." Roth v. United States, 354 U.S. 476, 514 (dissenting opinion). Although the evidence of laws contemporaneous with the ratification of the Constitution has been questioned, Justice Brennan also made clear that more recent history supports his conclusion, by noting the existence of obscenity laws in all the states. Roth v. United States, 340 U.S. at 485.

[37] *See* Comment, *supra* note 36, at 1161-62, for a summary of comic book legislation.

[38] *See* Police Comm'rs v. Siegel Enterprises, Inc., 255 Md. 110, 162 A.2d 727, *cert. denied* 364 U.S. 909 (1960); Katzev v. County of Los Angeles, 52 Cal. 2d 360, 341 P.2d 310 (1959). *Katzev* used the clear and present danger test.

[39] 333 U.S. 507 (1948).

[40] *Id.* at 519. Yet simultaneously, the *Winters* court found obscenity legislation more acceptable because history justified it. "They implied the 'grandfather clause' argument of *Roth*, which exempted obscenity from the most piercing scrutiny of First Amendment standards." Krislov, *supra* note 15, at 159.

[41] 390 U.S. 676 (1968). The City of Dallas enacted an ordinance establishing a Motion Picture Classification Board to classify films as suitable or not suitable for young persons. "Not suitable" included "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons." *Id.* at 681-82. Student notes have discussed the decision and its prior lower court opinions. *See* 33 Alb. L. Rev. 175 (1968); 55 Calif. L. Rev. 926 (1967); Comment, *Exclusion of Children from Violent Movies*, 67 Colum. L. Rev. 1149 (1967); Note, *Constitutional Law—The Sale of Obscene Material to Minors*, 37 U.M. Kansas City L. Rev. 127 (1969).

[42] 376 U.S. 254 (1964).

[43] Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191, 217-18.

categories: that which is worthy enough to require "the application of First Amendment protection and that which is beneath First Amendment" concerns.[44] Lower-level speech traditionally included fighting words,[45] group libel,[46] obscenity,[47] and commercial speech.[48] Utilizing the traditional approach, the plaintiffs in *New York Times* argued that libel was lower-level, not constitutionally protected, speech. Mr. Justice Brennan rejected the argument:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we are to other "mere labels" of state law. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.[49]

This statement may indeed signal the elimination of much lower-level speech, as commercial speech and group libel are now placed back under the protection of the first amendment.[50] Even though obscenity and fighting words may remain nonprotected categories, other broad categories of nonprotected speech have become less acceptable, so that creation of an analogous category for violent speech would probably not be warmly received.[51]

The unacceptability of a broad category does not, however, preclude line drawing or rule making which does not attempt to create "talismanic immunity" for violent speech. Just as a "deliberate, calculated falsehood" remains nonprotected,[52] so might a narrow class of violent expression in certain circumstances. Instead of carving out a broad category of nonprotected speech, one may engage in a more refined "definitional balancing," which "draws the constitutional line generically, by determining the meaning of constitutional guarantees for different classes of situations."[53]

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[44] *Id.* at 217.

[45] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[46] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[47] Roth v. United States, 354 U.S. 476 (1957).

[48] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[49] 376 U.S. at 269 (footnotes omitted).

[50] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); New York Times v. Sullivan, 376 U.S. 254 (1964); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) *aff'd mem. sub. nom.* Schwartz v. Vanasco, 423 U.S. 1041 (1976).

[51] *But see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), in which Mr. Justice Stevens indicates that society's interest in some types of expression is of a lesser magnitude than the interest in expression at the core of the first amendment. The Justice states:

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71.

Where violent expression would fit into Mr. Justice Stevens' graduated approach to the first amendment is not apparent.

However, delineating a narrow class of violent expression and distinguishing it from the violent expression which remains protected by the first amendment is a difficult task. For instance, "violent when viewed by children" in the Chicago ordinance does not apparently create a narrow class of violent expression.[54] Instead, modeled on the definition of obscenity formulated in *Miller v. California*,[55] the Chicago definition includes violent movies which lack serious artistic, political or scientific value.[56] As an attempt to accommodate free speech with the interests in preventing antisocial conduct and related harms, the Chicago formula is over-inclusive.

To avoid over-inclusiveness, the definition could be limited to violent movies causing viewers to engage in actual violence and criminal acts. Although this narrower definition may be less objectionable constitutionally, it may be currently unworkable given the inconclusive results of empirical studies attempting to relate violent media and crime. Separation of media into causal and noncausal categories would be guesswork, risking intrusion of censorship power into protected speech. This risk looms too large to warrant classification of even this narrow class of expression as nonprotected.[57]

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[52] New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

[53] Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 64. *See* Vanasco v. Schwartz, 401 F. Supp. 87, 95 (E.D.N.Y. 1975), *aff'd* 425 U.S. 401 (1976).

Laying down such rules of application is an approach which has gained much acceptability since New York Times v. Sullivan, 376 U.S. 254 (1963) was decided. That case established "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279-80.

[54] *See* text *infra* at note 4.

[55] 413 U.S. 15 (1973).

[56] CHICAGO ORDINANCE, *supra* note 4, at § 155.5(B).

[57] The Court of Appeals opinion in Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), *vacated*, 390 U.S. 676 (1968), states:

> As forceful as these arguments may be for the expansion of the scope of the classification standards, the long history of the misuse of the censorship power convinces us that the standard for classification must be restricted to the control of obscenity. In considering the classification approach, we cannot ignore the activities of the censors. . . . Because of the very real threat to the adult's freedom of speech and expression, the Supreme Court has apparently limited censorship affecting adults to a narrowly defined area of obscenity.

Id. at 598.

Alternative Approach: Application of Danger Test

To allow limited censorship of violent media without the difficulty of labeling such media as nonprotected, their protected status might be recognized but at the same time made subject to the "clear and present danger" test.[58] Because a major concern in censoring violent media is the prevention of antisocial, delinquent, or criminal acts, the public might well consider such media dangerous. If this dangerous quality reaches certain legal standards, the media in queston may be suppressed, not because it is by definition outside of the first amendment, but because that which could be protected speech may be so harmful that it justifies regulation.[59] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[60]

The convoluted history of the clear and present danger test makes it difficult to assume that the test is applicable to a motion picture censorship ordinance. Two problems impede application of the test: (1) determining the current formulation of the test and (2) evaluating whether this formula applies to entertainment as expression.[61]

The test in its metamorphosis from clear and present danger to the current standard of inciting imminent lawless action[62] has been formulated and

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[58] *See* Schenck v. United States, 249 U.S. 47 (1919).

[59] Mr. Justice Holmes, noting that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," first formulated the test for recognizing such speech. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[60] *Id.*

[61] *See generally* EMERSON, *supra* note 21; M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966); Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

[62] When Mr. Justice Holmes first articulated the clear and present danger test in Schenck v. United States, 249 U.S. 47 (1919), he applied it to Schenck's conviction for violating the Espionage Act of 1917 by distributing a leaflet concerning opposition to the draft. The creator of the test further discussed it in his dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). *Abrams* is remembered not only for the marketplace of ideas concept, but also for elevating the danger test from a rule of evidence to a constitutional level. *Id.* at 630. *Abrams* has thus been interpreted to mean that "for legislation to pass muster, it must be demonstrated that a permissible objective of government is imminently and substantially threatened." Strong, *supra* note 19, at 46. A few years later, Gitlow v. New York, 268 U.S. 652 (1925), attempted to limit the test to cases in which the statute was couched in nonspeech terms, distinguishing such cases from those in which the statute by its terms prohibited certain speech. The distinction was later eliminated yet may have influenced the growth of the test. *See* Dennis v. United States, 341 U.S. 494 (1951). *Gitlow* involved the statutory prohibition of advocacy of criminal anarchy.

Mr. Justice Brandeis, who had earlier joined in Mr. Justice Holmes' dissent in *Abrams*, further articulated the Holmes-Brandeis conception of the clear and present danger test in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring):

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil ap

revised in the subversive speech context. However, it has been applied in other contexts. For instance, the clear and present danger formulation was applied in four cases involving contempt citations for the publication of adverse comments on judicial behavior and pending cases.[83]

It has also been applied to speech evoking a hostile reaction from listeners,[84] a factual situation somewhat analogous to that of evoking a hostile

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> prehended is so imminent that it may befall before there is opportunity for full discussion. If there be time be expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.
>
> Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious.

Id. at 377. Miss Whitney was convicted of violating the Criminal Syndicalism Act of California for assisting in the organization of the Communist Labor Party. *Schenck*, *Abrams*, *Gitlow*, and *Whitney* thus all involved the application of the test in cases of speech as part of political action. The "substantive evil" was subversion or overthrow of the government by unlawful means. Mr. Justice Brandeis' words, quoted above, re-emphasize the political context in which the danger test was employed.

The test was reformulated several years later and again applied to political speech. In Dennis v. United States, 341 U.S. 494 (1951), the Court considered whether two sections of the Smith Act, concerned with advocating the overthrow of the government by force, violated the first amendment. Chief Justice Vinson rejected the Holmes-Brandeis test and replaced it with a formulation by Judge Learned Hand: "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510. The Hand-Vinson formula has been much criticized; one writer terms it "so pale in tone and so neutral in emphasis that it is hard to conceive of it as being used effectively to control governmental power over expression." EMERSON, *supra* note 21, at 115. Another notes that "*Dennis* has the dubious distinction of bringing to a head the paradox that the Holmes – Brandeis formulation of the danger test as a constitutional solvent would satisfy but few. . . . But to many it became, after *Dennis*, largely or wholly unsatisfactory because either too virile or overly weak." Strong, *supra* note 69, at 53.

The most recent formula announced by th Court is in Brandenburg v. Ohio, 395 U.S. 444 (1969), another political speech case which reversed a conviction of a Ku Klux Klan spokesman under the Ohio Criminal Syndicalism statute. The court made reference to the *Dennis* case, yet articulated its own test:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447.

[83] Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. at 263. In *Pennekamp v. Florida*, the Court found that there was a substantive evil in the disorderly and unfair administration of justice. 328 U.S. at 335. However, no adequate showing of clear and present danger was made in any of the four cases, and on this basis all the contempt citations were reversed.

> [84] The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions *incitement to riot or that religious liberty connotes the privilege to exhort others to a physical attack* upon those

reaction from a movie spectator. In *Terminiello v. Chicago*,[64] the test was applied in the case of a man charged with disorderly conduct. The speaker in *Terminiello* addressed an audience of several hundred people inside an auditorium, and his address stirred the crowd outside to anger. However, the Supreme Court found no danger in the turbulent crowd; speech only becomes nonprotected when "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[65] If an angry, turbulent crowd does not constitute a "clear and present danger," perhaps a passive audience of movie spectators may likewise not rise to the danger level.

Utilized in the context of political advocacy, contempt of court, and hostile audiences, the test, whether best phrased as clear and present, grave and probable, or likely to produce imminent lawless action, is nevertheless not easily applied to a new context. In fact, the several changes in the formula indicate difficulty in applying it in its *original* context. Some would limit the test to cases of subversive action and contempt of court;[67] others press for its total demise: "Since the test—whatever sense it may have made in the limited context in which it originated—is clumsy and artificial when expanded into a general criterion of permissible speech, the decline in its fortunes . . . seems to be an intellectual gain."[68]

Notwithstanding these restrictive comments, use of the relatively recent test in *Brandenburg v. Ohio*,[69] suggest its viability in certain circumstances. However, the revised formula must be applicable to the situation at hand.[70]

> belonging to another sect. When *clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (emphasis added).

[64] 337 U.S. 1 (1949).

[65] *Id.* at 5. Reversing the conviction on the grounds that the trial court construed the ordinance to permit the conviction if his speech merely "stirred people to anger, invited public dispute, or brought about a condition of unrest," Justice Douglas explained that a conviction resting on any of these grounds could not stand. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.* at 4-5.

[67] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965).

[68] Kalven, *"Uninhibited, Robust, and Wide Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968). Kalven praised the Warren court for "the abrogation of outmoded ideas," most significantly, "the great reduction in the status and prestige of the clear and present danger test."

And Mr. Justice Douglas, in his concurring opinion in *Brandenburg*, noted, "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain that it is not reconcilable with the First Amendment in days of peace." 395 U.S. at 452 (Douglas, J., concurring).

[69] In 1964, Kalven stated that "it is clear that, as of the judgment in the *Times* case, it has disappeared." Kalven, *supra* note 45, at 16. *Brandenburg* was decided in 1969.

[70] The *Brandenburg* formula may be current, yet limited to its factual context—*political advocacy which incites listeners to unlawful action*. But since the earlier versions of the test were

And tests focusing on advocacy and incitement are ill-suited to motion pictures as art or entertainment. Notes one commentor:

> The emphasis is all on truth winning out in a fair fight between competing ideas . . . . Not all communications are relevant to the political process. . . . Art and belles lettres do not deal in such ideas . . . and it makes little sense here to talk, as Mr. Justice Brandeis did in his great opinion in *Whitney*, of whether there is still time for counter-speech. Thus there seems to be a hiatus in our basic free-speech theory.[71]

Such criticism alone need not preclude application of the test to art or entertainment.[72] If a test is to be utilized, it will presumably be the *Brandenburg* formulation.[73] Translated into the context of movie censorship, under *Brandenburg*, only violent movies that incite viewers to commit criminal acts within a short time would be censored. Without reliable empirical proof of the causation of antisocial conduct, a test resting on such proof would result in automatic rejection of the Chicago ordinance or any comparable scheme.[74] Given the inadequacy of current attempts to show causation it is appropriate to wait for such proof.

II. PERMITTING LIMITED CENSORSHIP TO PROTECT CHILDREN

Without hard empirical evidence to provide a distinction between films which incite viewers to commit criminal acts and films which are harmless, it is sound to deny constitutional validity to a general scheme for censoring violent motion pictures under any existing first amendment analysis. Nevertheless, narrow censorship confined to the protection of children may be constitutional. The Supreme Court has signaled the acceptability of special pro-

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developed in the political contest yet applied at least occasionally in other contexts, perhaps the *Brandenburg* test too can be applied outside of the political organization scene. Hoever, by its own terms, the test is limited to *advocacy* and *incitement*; in the words of the case, "the constitutional guarantees . . . do not permit a State to forbid or proscribe *advocacy* . . . except where such *advocacy* is directed to *inciting* . . . imminent lawless action. . . ." 395 U.S. at 447 (emphasis added). The obvious question, then is whether movie censorship can be assessed by a test focusing on advocacy and incitement. Kinsley Int'l Pictures v. Regents, 360 U.S. 684 (1959), warns that censorship laws cannot prevent the exhibition of a movie that advocates an idea—in this case, that adultery may be proper under certain circumstances. The court seems to reason that where advocacy of conduct falls short of incitement, regulation interferes with ideas. 360 U.S. at 688-89. The use of the language of "advocacy" and "incitement" in *Kingsley* may indicate that a *Brandenburg* test is applicable to motion picture censorship.

[71] Kalven, *supra* note 21, at 16.

[72] *See* Buchanan, *Obscenity and Brandenburg: The Missing Link?*, 11 HOUS. L. REV. 537, 570 (1974).

[73] See note 69 *infra*.

[74] Krislov suggests that those who oppose all obscenity regulation "adopt a thinly veiled form of the same position by suggesting that publications may be censored only upon proof of a 'clear and present danger' of an evil that rather self-evidently is not provable under present conditions in the behavioral sciences." Krislov, *supra* note 15, at 155.

373

tection for children from obscenity[75] and has offered a rough delineation of variable obscenity,[76] which enables the state to regulate the dissemination of materials to juveniles which it could not regulate as to adults.[77] It is conceivable that similar variable definitions for censoring violence may be acceptable. However, the case law precedents for variable obscenity have been brought into question by a subsequent change in the definition of obscenity.[78] The weak support offered by such cases is further diluted by the fact that the cases address only the subject of obscenity and not that of violent expression.[79]

It is nevertheless well settled that more stringent controls on communicative materials available to youths may be utilized in certain contexts.[80] At the same time, it is only in relatively narrow and well-defined circumstances that the government may bar such dissemination of protected materials to minors.[81] In other words, while recognizing that different standards may apply to legislation focused on minors, the Supreme Court has not precisely articulated the differences.[82]

In view of the lack of guidelines, it becomes a formidable task to create legislation restricting dissemination of violent materials to minors which would survive a constitutional challenge, and it appears inevitable that such legislation would be paticularly susceptible to a due process challenge on the grounds of vagueness.[83] Mr. Justice Marshall stated in *Interstate Circuit*[84] that the vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing.[85] A licensing ordinance, even if confined to films exhibited to youths, may well affect the marketability of films for adult audiences and as a consequence affect the first amendment interests of such adults.[86] Moreover, the permissible extent of vagueness is not a function of the extent of the power to regulate or control expression with respect to children; vagueness is not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.[87]

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[75] We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children . . . State and local authorities might well consider whether ther objectives in this area would be better served by law aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.

See Jacobellis v. Ohio, 378 U.S. 184, 195 (1964)(Brennan, J., in dictum).

[76] Krislov, *supra* note 16; *see also* Note, *For Adults Only: The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141 (1959); Note, *Private Censorship of Movies*, 22 STAN. L. REV. 618 (1970).

[77] *See* Rabeck v. New York, 391 U.S. 462 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968).

[78] In *Ginsberg v. New York*, the Court adopted a variation of the adult obscenity standards enunciated in Roth v. United States, 354 U.S. 476 (1957), and Memoirs v. Massachusetts, 383 U.S. 413 (1966); however, the court abandoned the Roth-Memoirs test in Miller v. California.

[79] In Erznoznik v. Jacksonville, 422 U.S. 205, 213 (1975), Mr. Justice Powell stated, "In Miller v. California, *supra*, we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect Miller will have on the Ginsberg formulation. *Erznoznik* involved an ordinance making it punishable for a drive-in theater to exhibit films containing nudity, when the screen is visible from the street. The ordinance was held invalid.

A Seventh Circuit case involving a similar ordinance addressed the question of whether a city may go beyond the restrictions implicit in the concept of variable obscenity and concluded that "a city may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity in regulating the dissemination to juveniles of 'objectionable' material." Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1303 (7th Cir. 1973).

[80] 422 U.S. at 212.

[81] *Id.* at 212-13.

[82] *See generally* Erzonznik v. Jacksonville, 422 U.S. 205 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Tinker is cited in *Erzonoznik* not only for the proposition that "[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors," 422 U.S. at 214, but also

Just as the Dallas licensing ordinance failed without narrowly drawn, reasonable and definite standards for the officials to follow,[88] so might the

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for the assertion that first amendment rights of minors are not coextensive with those of adults. *Id.* at n.11. Mr. Justice Stewart's concurring opinions in *Tinker* and *Ginsberg* are quoted for the idea that a child is like someone in a captive audience, not possessed of full capacity for individual choice. *Id.* If a minor's viewing of a violent movie is "like someone in a captive audience," it may qualify as one of the unnamed "precisely delineated areas" which may be regulable. *Id.* The finding of mootness in Jacobs v. Board of School Comm., 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) may be another indication of a present interest in avoiding difficult decisions on first amendment rights of children. Jacobs concerned a high school underground newspaper. An earlier precedent for regulating matters where minors' first amendment rights are involved is Prince v. Massachusetts, 31 U.S. 158 (1944), in which the Court held that parents could not ignore child labor laws in order to distribute religious literature. Prince can be interpreted as balancing first amendment rights with the concerns of child labor laws. The Fifth Circuit opinion in Interstate Circuit, 366 F.2d 590 (1966), *rev'd and remanded*, 390 U.S. 676 (1968), considered arguments based on Prince but rejected them in light of the long history of the misuse of censorship.

[83] Censorship regulation must avoid the vices of vagueness and overbreadth. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 167 (1960). The following are examples of censorship cases in which the vagueness doctrine has been used: Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ("sacrilegious"); Gelling v. Texas, 343 U.S. 960 (1952) ("of such character as to be prejudicial to the best interests of the people"); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) ("tend to corrupt morals").

[84] See note 41 *infra*.

[85] Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 683 (1978).

[86] Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Id. at 684.

[87] *Id.* at 688-89.

[88] *Id.* at 690.

Chicago ordinance be fatally vague.[**] In the absence of clear-cut empirical evidence or articulated standards of law, it follows that almost any legislative attempt to impose restrictions on expression beyond the scope of obscenity or variable obscenity would, in the words of the Supreme Court, set the censor adrift upon a boundless sea.[**] Consequently, even if a form of censorship limited to children is theoretically permissible, a sufficiently limited ordinance may be impossible to draft or to apply, given the current lack of standards — inherent in any definition of violent media harmful to children.

CONCLUSION

Because empirical data cannot offer conclusive proof of either the presence or absence of a causal connection between viewing violent movies and the occurrence of serious antisocial behavior, and because legal precedents are slim, carving out a new category of nonprotected expression is not justifiable. In addition, it seems erroneous to conclude that lawless action is imminent when empirical research denies such clarity. Although the state's special interest in children may justify some very limited form of censorship which would affect only minors, a sufficiently limited ordinance may be impossible to draft and impractical in application. As a model, the Chicago ordinance does not appear to be narrowly drawn and, therefore, if challenged in court, may fail on grounds of vagueness. In the absence of ascertainable standards, the risk of the censors intruding into protected speech looms too large.

MARY B. COOK

[**] A judicial decison on the constitutionality of the Chicago ordinance may well rest on grounds of vagueness. This was the approach of the Court in *Interstate Circuit*, in which Mr. Justice Marshall discussed the vices of vagueness. He also noted,

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

390 U.S. at 689.

The Chicago definition is indeed vague. Although the ordinance includes a lengthy list of descriptive terms, the very inclusiveness of the list makes it difficult to tell what the prohibited expression is supposed to be. Furthermore, the standard of lacking serious literary, artistic, political, or scientific value is even more vague. This standard has been accepted in the area of obscenity regulation, but it may not be found so acceptable in this new area. In addition to, or instead of, being vague, the standard may be overbroad. If it invades areas of protected speech or has a chilling effect, the ordinance may be invalid for facial overbreadth. Vagueness and related overbreadth may, therefore, be the greatest weakness in the Chicago ordinance.

[**] Interstate Circuit, Inc. v. City of Dallas, 390 U.S. at 684.

B. SELECTED BIBLIOGRAPHY ON THE REGULATION OF THE MASS MEDIA

RESOLVED: THAT THE FEDERAL GOVERNMENT SHOULD SIGNIFICANTLY STRENGTHEN THE REGULATION OF MASS MEDIA COMMUNICATION IN THE UNITED STATES.

Part 1: Broadcast Media

Access to the air; a conference on the public responsibility of broadcast licencees and the ethical and legal considerations of equal time, editorializing, personal attacks, balanced programming, and the fairness doctrine, Delmonico's Hotel, New York, Sept. 28-29, 1968. New York, Graduate School of Journalism, Columbia University, 1969. 46 p.

Andison, F. Scott. TV violence and viewer aggression: a cumulation of study results, 1956-1976. Public opinion quarterly, v. 41, fall 1977: 314-331.

"Although there do exist several problems with the results cumulated, it seems quite clear that according to the findings of the studies collected there is at least a weak positive relationship between watching violence on television and the subsequent aggression displayed by viewers of that violence. In light of these findings, one would assume that the violence aired on television requires some curtailment, at least until the time that a definite conclusion is reached."

Albert, James A. The Federal and local regulation of cable television. Colorado law review, v. 48, summer 1977: 501-523.

Article examines legal issues associated with cable television. Critiques roles of its regulatory agencies and reviews the latest regulatory decisions.

American Bar Association. Communications Law Committee. Electronic journalism and First Amendment problems. Federal communications bar journal, v. 29, no. 1, 1976: 1-62.

Presents recommendations and background with respect to "the fairness doctrine, both in broadcasting and cable television; the policies of the Federal Communications Commission concerning slanted or staged news; the ban...on editorializing by noncommercial educational broadcast stations; and the strict requirements of 'objectivity and balance' in...the Public Broadcasting Act of 1967."

Atkin, Charles, and others. Selective exposure to televised violence. Journal of broadcasting, v. 23, winter 1979: 5-13.

"This panel survey provides supportive evidence for selective exposure to aggressive television entertainment programming which is compatible with aggressive attitudinal predispositions. Even with a conservative regression analysis that controls for grade, sex, and initial viewing patterns, a significant relationship remains between prior orientations and subsequent program choices."

August, Ellen. Writers Guild v. FCC: duty of the networks to resist governmental regulation. Syracuse law review, v. 28, spring 1977: 583-607.

Comment reviews a district court case concerning the television "family hour" policy. The court imposed a duty on the television networks to resist government intervention into programming decisions on the basis of the First Amendment. This comment finds the Communications Act of 1934 or the Sherman Antitrust Act to be a preferable basis for the decision.

Baker, Joan. Free speech and Federal control: the U.S. approach to broadcast regulation. Modern law review, v. 39, Mar. 1976: 147-161.

Explores the problem of control over program content in the context of the U.S. broadcast structure.

Becker, Jo Ann M. Unleashing cable TV, leashing the FCC: constitutional limitations on government regulation of pay television. Fordham urban law journal, v. 6, spring 1978: 647-665.

Case note reviews the 1977 Home Box Office court of appeals decision which set aside FCC rules limiting pay TV programming, reduced the Commission's authority to regulate pay TV, and restricted ex parte contacts. Calls it a "resounding victory for cable television interests."

Benet, James. Public TV kills a news winner: foreclosure on the fourth estate. Nation, v. 225, Dec. 3, 1977: 588-590.

Discusses why the San Francisco public television program, Newsroom, went off the air in mid-October, 1977 after nine successful seasons. Suggests that the reasons for the removal of this program and and others like it, include the withdrawal of private foundation funding for public television and an increase in the involvement of commercial television in public broadcasting.

Berner, Richard Olin. Constraints on the regulatory process: a case study of regulation of cable television. Cambridge, Mass., Ballinger Publishing Co., 1976. 107 p.

Besen, Stanley M. and Mitchell M. Bridger. Economic analysis and television regulation: a review. Santa Monica, Rand, 1973. 22 p.

Beutler, Margot. Texas broadcasting: who shall govern? Texas observer, v. 70, Oct. 20, 1978: 4-8.

Examines the concentration of ownership of television and radio stations in Texas. Criticizes the FCC for its licensing policies which, the author alleges, discriminate against independent broadcasters.

Bever, Thomas G. and others. Young viewers' troubling response to TV ads. Harvard business review, Nov.-Dec. 1975: 109-120.
The authors found that "current advertising techniques may be neither effective nor responsible for use with children."

Busterna, John C. Diversity of ownership as a criterion in FCC licensing since 1965. Journal of broadcasting, v. 20, winter 1976: 101-110.
Examines diversity of ownership as a criterion in FCC licensing relative to other stated criteria.

Cable television and content regulation: the FCC, the First Amendment and the electronic newspaper. New York University law review, v. 51, Apr. 1976: 133-147.
Comment demonstrates "that the rationale behind broadcast regulation is wholly inappropriate to cable and that, if analogies are to be drawn, cable is more akin to the printed than to the broadcast media."

Chapman, Stephen. Down with public television. Harpers magazine, v. 259, Aug. 1979: 77-80, 84.
Examines the Carnegie Commission on the Future of Public Broadcasting's report and contends that "the report can best be read as a disinterested analysis of public broadcasting, but as a brief on behalf of public broadcasting's entrenched interests." Criticizes the current operation of public television and questions the need for Federally-funded television, wondering if cable and cassettes can serve small audiences better.

Charren, Peggy. Children's TV: sugar and vice and nothing nice. Business and society review, no. 22, summer 1977: 65-70.
"Attacks the television advertising and children's products industries for disregarding the vulnerability and social and human needs of children. Calls for the regulation of commercial children's television."

Cline, Victor B., Roger Croft and Steven Courrier. The Desensitization of children to television violence. University of Utah, 1975. 20 p.
"Children with histories of high and low exposure to television (and the violence therein) were exposed to a moderately violent film. Measures of autonomic response (skin conductance and blood volume pulse amplitude) were taken before and during their exposure to the violent film. Over both measures and in another replicated study the high TV exposure subjects were found to be significantly less 'aroused' autonomically suggesting a limited but still definite and measurable desensitization to filmed violence. Since the subjects had had no, or no recent, exposure to the particular film, the results suggest the possibility of a generalizing effect for the desensitization that occurred."

Cohen, Richard E. Broadcast, cable industries face off on cable reform plan. National journal, v. 8, Feb. 7, 1976: 159-166.

Committee for Economic Development. (Research and Policy Committee) Broadcasting and cable television, policies for diversity and change: a statement on national policy. New York, CED, 1975. 119 p.

Cowan, Geoffrey. See no evil: the backstage battle over sex and violence on television. New York, Simon and Schuster, 1978. 323 p.

"The Family Hour failed, and just how ignobly it did so is told in the situation-comedy Geoffrey Cowan offers us in 'See no evil.'"

Crandall, Robert W. Regulation of television broadcasting; how costly is the "public interest"? Regulation, v. 2, Jan.-Feb. 1978: 31-39.

Explores "the rationale underlying the FCC's policy for regulating commercial television broadcasting" and examines "whether that policy has been effective, regardless of the merits of those objectives." Believes that "the FCC's policy for allocating channels has restrained competition, fostered monopoly profits in broadcasting, and provided the means for subsidizing 'merit' programming." Examines local and network programming costs and doubts "that the FCC can stimulate local programming efforts by restricting the number of stations in a given week."

Crowley, Juanita, A. and David F.B. Smith. Constitutional ramifications of a repeal of the fairness doctrine. Georgetown law journal, v. 64, July 1976: 1293-1321.

Comment focuses on the First Amendment issues raised by repeal of the fairness doctrine.

Demkovich, Linda E. Pulling the sweet tooth of children's TV advertising. National journal, v. 10, Jan. 7, 1978: 24-26.

"The Federal Trade Commission is trying to decide how much protection children need from the advertisements they see on television. Critics say the ads for sugary cereals and other products shouldn't be shown to children, but the industry says the critics are off base. The FTC may decide this month what it will do about the complaints."

Doob, Anthony N. and Glenn E. Macdonald. Television viewing and fear of victimization: is the relationship causal? Journal of personality and social psychology, v. 37, no. 2, Feb. 1979: 170-179.

"Previous findings have suggested that people who watch a lot of television are more likely to fear their environment than are those who report being less frequent viewers of television. From this simple correlation, previous authors have suggested that television causes people to overestimate the amount of danger that exists in their own neighborhoods. The present study attempted to replicate this finding and to determine if the apparent effect was due to a previously uncontrolled factor: the actual incidence of crime in the neighborhood."

Edlevitch, Susan T. The fairness doctrine and access to reply to product commercials. Indiana law journal, v. 51, spring 1976: 756-782.

Comment examines the FCC's new policy with regard to product commercials in its decision to remove product and service advertisements from fairness scrutiny. Demonstrates that the Commission is not free to insulate standard product advertising from fairness obligations as seen in the Supreme Court's decision in Bigelow v. Virginia.

Emerson, Thomas Irwin. The system of freedom of expression. New York, Random House, 1970. 627-673 p.

Historically the First Amendment has been applied negatively, i.e., to prohibit interference with freedom of expression. This chapter explores precedents and theories for affirmative application of the First Amendment to actively promote freedom of expression.

Fairness and unfairness in television product advertising. Michigan law review, v. 76, Jan. 1978: 498-550.

Article sketches some findings on the impact of television advertising; examines how the FCC (via the fairness doctrine) and the FTC (via deceptive advertising regulation) "could provide for the effective presentation of contrasting points of view on controversial issues implicitly or explicitly raised by television product advertising, could ensure that the implicit messages of such advertisements are delivered fairly and without deception, and could counter the adverse effects of such advertising;" and considers constitutional limits on regulatory action.

Federal regulation of television broadcasting -- are the Prime Time Access Rule and the Family Hour in the public interest? Rutgers law review, v. 29, summer 1976: 902-920.

Comment examines the development of the Prime Time Access Rule and considers the First Amendment and public interest consequences of its interaction with Family Viewing Hour.

Feldman, Charles and Stanley Tickton. Obscene/indecent programming: regulation of ambiguity. Journal of broadcasting, v. 20, spring 1976: 273-282.

"The 'topless radio' phenomenon was briefly widespread -- and controversy about such formats continues to appear. This article reviews two important FCC decisions, Sonderling (WGLD-FM), and Pacifica (WBAI-FM), to discern and describe FCC policy trends and attempts to define just what obscenity and indecency is and what standards for broadcasting should exist."

Feingold, Murray and Timothy G. Johnson. Television violence -- reactions from physicians, advertisers and the networks. New England journal of medicine, v. 296, Feb. 24, 1977: 424-427.

"Maintains that the burden of proof that television violence does no harm lies with those who introduce it into society. Advertisers and networks will respond, we believe, to the problem of television violence if continuous public pressure is maintained.

Flanagan, Bill. CATV and the broadcasters. Columbia, School of Journalism, University of Missouri, 1979. 7 p. (Missouri University. Freedom of Information Center. Report no. 399)

"The competitive battle between cable television and broadcast stations is being fought on two fronts in the United States in 1978: pay-TV and distant signal importation. Pay-TV most directly competes with the networks by potentially 'siphoning' away sports and feature films. Cable systems that import distant signals could potentially 'fragment' the local audience. Both areas are more competitive than ever before, thanks to recent court and FCC decisions.

Franklin, Marc A. Cases and materials on mass media law. Mineola, N.Y., Foundation Press, 1977. 878 p.

Friendly, Fred W. The good guys, the bad guys and the first amendment: free speech vs. fairness in broadcasting. New York, Vintage Books, 1977. 268 p.

Gerbner, George and others. Highlights of violence profile no. 10: trends in network television drama and viewer conceptions of social reality, 1967-1978. Philadelphia, Annenberg School of Communications, University of Pennsylvania, April 1979. 28 p.

"This research is a part of the Cultural Indicators study in television content and effects, conducted under grants from the American Medical Association and the National Institute of Mental Health."

Ginsburg, Douglas H. Regulation of broadcasting: law and policy towards radio, television, and cable communications. St. Paul, West Publishing Co., 1979. 741 p.

Goldberg, Henry and Michael Couzens. "Peculiar characteristics": an analysis of the First Amendment implications of broadcast regulation. Federal communication law journal, v. 31, winter 1978: 1-50.

"The focus of this article is on those explicit and implicit regulatory controls that are exercised to require or encourage the presentation of certain favored categories of programs (e.g., news, public affairs, children's programs) and of content (e.g., reflecting the interests of racial and ethnic minorities, nonviolent and 'prosocial' material in children's programs, diverse radio program formats)." Reviews the background and growth of such regulations, analyzes the legal justification, both generally and with respect to particular regulations and makes various recommendations.

Goldberg, Marvin E. and Gerald J. Gorn. Children's reactions to television advertising: an experimental approach. Journal of consumer research, v. 1, Sept. 1974: 69-75.

"Both the effects of a child's expectancy of receiving a toy and the number of TV commercials he sees for the toy were examined in an experimental paradigm." The authors conclude that "the attitudes and behavior of 8-10 year old boys are affected by commercial exposure. Seeing a single commercial for a valued toy produces more favorable reactions to the toy and increases motivated behavior to obtain it, but further exposure to commercials does not increase these effects."

Grefe, Andrea Jane. The Family Viewing Hour: an assault on the First Amendment? Hastings constitutional law quarterly, v. 4, fall 1977: 935-989.

Comment reviews a 1976 district court opinion holding that the Family Viewing Hour policy of the NAB Television Code resulted from state action and thereby violated the First Amendment. "The author concludes that the Family Viewing Hour policy, in addition to being the result of state action, was an impermissible prior restraint of protected speech and was unconstitutionally vague and overbroad."

Greene, Susan C. The cable television provisions of the revised Copyright Act. Catholic University law review, v. 27, winter 1978: 263-303.

Article analyzes the impact of the Copyright Revision Act of 1976 on cable television. "The revised [Copyright] Act will require cable television systems to make royalty payments for the privilege of retransmitting distant broadcast signals. Although this change will resolve a long-standing dispute between the copyright owners and original broadcasters on the one hand, and the cable television industry on the other, the revised Act promises to generate extensive litigation as a result of ponderous implementation procedures and the creation of a new conflict between copyright law and national communications policy."

Grundfest, Joseph A. Citizen participation in broadcast licensing before the FCC. Santa Monica, California: Rand Corporation, 1976. 195 p.

Hamburg, Morton I. All about cable: legal and business aspects of cable and pay television. New York, Law Journal Seminars-Press, 1979. 783 p.

Harding, Ronald. Freedom of speech: one step backward: Columbia Broadcasting System, Inc., v. Democratic National Committee. New England law review, v. 9, winter 1974: 321-331.

Case note discusses the case in which "the United States Supreme Court ruled that radio and television licensees did not violate the Federal Communications Act or the First Amendment by refusing to sell editorial advertising time to all who sought it."

Hilker, Anne K. Tort liability of the media for audience acts of violence: a constitutional analysis. Southern California law review, v. 52, Jan. 1979: 529-571.

Comment contends "that media liability for damage caused in imitation of a media message could arise under traditional tort doctrine, but that the first amendment protections enunciated by the United States Supreme Court in Brandenburg v. Ohio should be applied when tort actions are brought against media defendants for audience acts of violence."

Howard, Herbert H. Multiple ownership in television broadcasting: historical development and selected case studies. New York, Arno Press, 1979.

Johnson, Nicholas. Television's conflict of interests. Center magazine, v. 9, July-Aug. 1976: 50-54.

Former FCC member comments on the conflict between the public interest and television's commercial interests, cable's potentialities, television advertising, cross-ownership, the Fairness Doctrine, U.S. as compared to foreign broadcasting, as well as his own present lobbying activities.

Johnson, R.B. Federal regulations relevant to the structural development of telecommunications industries. Washington, U.S. Office of Telecommunications, 1977. 61 p. (U.S. Office of Telecommunications. OT report 77-135)

"This report discusses major federal telecommunications regulations and policies which have had a significant impact on the structural development of the broadcast, common carrier, and cable television (CATV) industries. Included in this discussion are a historical treatment of the development and reasoning behind those regulations and policies, and the major judicial decisions which have interpreted them."

Kaso, Cris T. The right of "resonable access" for Federal political candidates under section 312(a) (7) of the Communications Act. Columbia law review, v. 78, Oct. 1978: 1287-1307.

"In 1972 Congress enacted section 312 (a) (7) of the Communications Act, thereby creating an affirmative right of 'reasonable access' to the broadcast media for political candidates for Federal office." Comment considers the impact of this section on communications law.

Karp, Richard. License to kill? The curious case of WHBI-FM vs. the FCC. Barron's, Mar. 1, 1976, p. 5, 14, 16, 22, 24.

Describes the controversy behind the FCC's move to revoke the broadcast license of WHBI-FM.

Kielbowicz, Richard B. Discrimination or discriminating licensing?: FCC policy and newspaper ownership of TV stations, 1945-1970. Administrative law review, v. 30, summer 1978: 423-446.

Article documents the FCC's "timid" TV station ownership diversification policy during 1945-70 and points out constraints on the FCC. Notes newspapers' complaints of discrimination against them by the FCC in TV station ownership policy.

Lashner, Marilyn A. The role of foundations in public broadcasting. Part I: development and trends. Journal of broadcasting, v. 20, fall 1976: 529-547.

Provides "a broad introduction to the background, problems, and prospects for foundation support of non-commercial broadcasting in the U. S."

----- The role of foundations in public broadcasting, II: the Ford Foundation. Journal of broadcasting, v. 21, spring 1977: 235-254.

The Law of political Broadcasting and Cablecasting [the FCC's so-called "Political Broadcast Primer"], 43 Federal Register 36341 (Aug. 16, 1978), and corrections, 43 Federal Register 37977 (Aug. 24, 1978). Washington, U.S. Government Printing Office, 1978. 58 p.

Lees, Gail Ellen. Unsafe for little ears? The regulation of broadcast advertising to children. UCLA law journal, v. 25, June 1978: 1131-1186.

"Comment contends that false and deceptive advertisements are rightly forbidden, but that no comprehensive ban on advertising to children may issue without a definitive showing of harm. After focusing on children's advertising in general, the comment discusses commercials for specific products. In each context, the effects of television advertising on children and the impact proposed regulations would have on children's programming and on protected commercial speech are examined."

Lewis, Charles E. and Mary A. Lewis. The impact of television commercials on health-related beliefs and behaviors of children. Pediatrics, v. 53, no. 3, Mar. 1974: 431-435.

"Fifth and sixth grade students in two elementary schools were requested to watch television and describe several commercial 'messages' related to health. Children were asked for their conclusions, (inferences), if they believed the message, and if either they or their parents used the product advertised. Two hundred and eight students believed 70 percent of 781 commercials viewed. Forty-five percent of the children had used the product advertised, and 55 percent of their parents were said to be users. Of the children, 47 percent were 'true believers' (accepting all messages as true). Personal experience and parental modeling behavior (use) increased the credibility of messages. The frequency of use of advertised products and acceptance of the messages as true was higher among children from lower socioeconomic backgrounds."

Lipsky, Abbott B., Jr. Reconciling Red Lion and Tornillo: a consistent theory of media regulation. Stanford law review, v. 28, Feb. 1976: 563-588.

Comment examines "the situation in which government involvement in the affairs of the broadcast media is significantly greater than its involvement with the publishing industry." Author maintains that whether this difference in treatment is legally characterized as a qualified admission of the broadcast media into the set of institutions comprising "the press," or as a partial abridgement of "the freedom" of the broadcast press, the Supreme Court has tolerated the enhanced government control of the broadcast media.

Loeb, G. Hamilton. The Communications Act policy toward competition: a failure to communicate. Duke law journal, Mar. 1978: 1-56.

Article searches for guidance on FCC competition policy in the Communications Act of 1934 and its legislative history. Tentatively, concludes "the more convincing view of the Act is that it contains no per se prohibition on FCC discretion to follow a policy of introducing competition in telecommunications."

Long, Stewart Louis. The development of the television network oligopoly. New York, Arno Press, 1979.

Lopiparo, Jerome J. Aggression on TV could be helping our children. Intellect, v. 105, Apr. 1977: 345-346.

"To attribute to TV the sole responsibility for the unfortunate state our 'moral and social values' are in smacks of close-minded scapegoating."

Loye, David. TV's impact on adults: it's not all bad news. Psychology today, v. 11, May 1978: 87-88, 90, 93-94.

"The studies up to now have focused largely on how violent programs affect the young. In one of the first field studies on adults, groups of Los Angeles men watched TV at home- while their wives watched them."

MacAvoy, Paul W., ed. Deregulation of cable television. Washington, American Enterprise Institute for Public Policy Research, 1977. 169 p. (Ford Administration papers on regulatory reform)

"The Federal Communications Commission in the last five years has developed a set of restrictions on cable television as part of its regulation of the broadcasting industry. This volume is a compilation of studies undertaken under the regulatory reform program or elsewhere in the government in 1975-1976 to evaluate these restrictions."

MacKie, Alexander. The children's advertising battle. Columbia, School of Journalism, University of Missouri, 1979. 6 p. (Missouri University. Freedom of Information Center. Report no. 398)

"Cap'n Crunch meets the FTC this month, as hearings begin on a proposal to limit television advertising directed at children. Included in this report are the major arguments expected to be advanced by both pro- and anti-regulation groups in what many observers consider the most controversial proceeding ever undertaken by a regulatory agency."

Maize, Kennedy P. Broadcasting's deregulated future. Washington Editorial Research Reports, 1979. p. 167-184. (Editorial research reports, 1979, v. 1, no. 9).

Contents. -- Forces of change in broadcasting. -- Broadcasting as a public trust. -- Technology's deregulatory potential.

Malet, Edwin I. The FCC's cable television jurisdiction: deregulation by judicial fiat. University of Florida law review, v. 30, summer 1978: 718-751.

Comment explores the policies of the current FCC cable regulations, discusses the limitations that have been placed on the FCC's jurisdiction over cable by Congress and the Supreme Court and analyzes the "proper scope of the FCC's authority in terms of the recent developments in cable television law with a view toward reconsideration of the Supreme Court's past decisions in this area."

Martin, Charles Vance. Fairness doctrine in adverteing. Columbia, School of Journalism, Univeristy of Missouri, 1977. 7 p. (Missouri University. Freedom of Information Center. Report no. 375)

" The author discusses why, after a decade of debate, FCC rulings and court decisions, the application of the fairness doctrine to commercial advertising continues to be an unsettled issue." The conclusion is that, while the "FCC has been consistent in its determination of what is a controversial issue of public importance" and thus subject to the fairness doctrine, "the courts have overruled the FCC on enough occasions to encourage those who desire a wider application of the doctrine to press their complaints."

Matthews, Donald C. Potomac fever: deregulating telecommunications. America, v. 141, July 14, 1979: 6-8.

Discusses the deregulation of telecommunications and concludes that "limiting Federal bureaucracy and modernizing outdated regulations are long overdue in the communications industries, yet once the rules go, the public could become a victim of the profit motive."

McAnany, Emile G. Television: mass communication and elite controls. Society, v. 12, Sept.-Oct. 1975: 41-46.

"Basically, television is an expensive and complicated technology, which fosters centralization and control by a few groups that have the money and influence to create and send messages. On an international level, this means that a few wealthy and technologically advanced countries have control over television messages and their distribution. Television's expense has meant that poorer countries have had to commercialize their broadcasting to a great extent and have been forced to buy cheap program series from dominant producer countries."

McMahon, Robert Sears. Federal regulation of the radio and television broadcast industry in the United States, 1927-1959: with special reference to the establishment and operation of workable administrative standards. New York, Arno Press, 1979.

Mosco, Vincent. The regulation of broadcasting in the United States: a comparative analysis. Cambridge, Mass., Harvard University, Program on Information Technologies and Public Policy, 1975. 294 p.

Naktenis, Patricia Eileen. Use of petitions by minority groups to deny broadcast license renewals. Duke law journal, v. 1978, Mar. 1978: 271-301.

Comment examines grounds for petitions to deny broadcast license renewals that have been of particular interest to minority groups. Reviews some recent litigation which suggests that petitions to deny based on licensee employment practices or ascertainment of community needs should have a greater chance of success.

National Association of Broadcasters. Legal guide to FCC broadcast rules, regulations, and policies. Washington, NAB, 1977. 1 v.

Noll, Roger G., Merton J. Peck and John J. McGowan. Economic aspects of television regulation. Washington, Brookings Institution, 1973. 342 p. (Studies in the regulation of economic activity)

Noto, Thomas A. FCC regulation of cable television content. Rutgers law review, v. 31, July 1978: 238-268.

Comment discusses "the relation of cable to the first amendment and the foreseeable effects of imposing broadcast obscenity standards on cable." Contends that "cable should be less stringently regulated than broadcasting" and believes that "the pending FCC proposal to regualte obscenity and indecency over cable is dangerous to the development of this medium."

Parkman, Allen. An economic analysis of the FCC's multiple ownership rules. Administrative law review, v. 31, spring 1979: 205-221.

Article examines the FCC rules in the context of their effect on diversity of viewpoints and programming in television. Concludes that "because the FCC has been reluctant to take a realistic look at the economic structure of the television industry, it has generally ended up with rules that generate less true diversity than if the rules did not exist at all. Locally, by limiting future combinations while discouraging existing combinations, they reduce the number of truly different voices in local news. ...Nationally, by imposing limits on the number of stations that can be controlled by one party and by inefficiently allocating the existing channels, they reduce the possibility of another network being created."

Press protections for broadcasters: the radio format change cases revisited. New York University law review, v. 52, May 1977: 324-361.

In the context of five suits by listeners challenging the rights of radio broadcasters to change their entertainment formats, this comment analyzes the balance between statutory public interest obligations of broadcasters and First Amendment protections.

Ratner, Ellis, and others. FTC staff report on television advertising to children. Washington, U.S. Government Printing Office, Feb. 1978. 346 p.

A report discussing a recommendation "that the Commission commence rulemaking under applicable provisions of the Magnuson-Moss Federal Trade Commission Improvements Act to eliminate harms arising out of television advertising to children."

Reed, Omer Lee, Jr. The psychological impact of TV advertising and the need for FTC regulation. American business law journal, v. 13, fall 1975: 171-183.

Article attempts "to present one model of how television commercials motivate consumers to consume and to compare this understanding with the Federal Trade Commission response to advertising under the FTC Act." Argues that the FTC has the power to regulate "misleading psychological advertising though it has not hitherto exercised it."

Research on the effects of television advertising on children: a review of the literature and recommendations for future research. Washington, National Science Foundation, 1977. 229 p.
"NSA/RA-770115"

Partial contents. -- Background: children's television viewing patterns. -- Children's ability to distinguish television commercials from program material. -- Source effects and self-concept appeals in children's television advertising. -- The effects of children's television food advertising. -- The effects of television advertising on consumer socialization. -- Summary of research findings.

Rivkin, Steven R. A new guide to Federal cable television regulations. Cambridge, Mass., MIT Press, 1978. 314 p.

Robertson, Thomas S. and John R. Rossiter. Children and commercial persuasion: an attribution theory analysis. Journal of consumer research, v. 1, June 1974: 13-20.

"This article studies children's levels of understanding of television commercials and the associated effects upon attitudes and purchase request tendencies. Attribution theory, with its focus on perception of intent, is the research framework. The results suggest that when a child attributes persuasive intent to commercials, he believes them less, likes them less, and is less likely to want the products advertised."

Robinson, Deanna C, Jerry F. Hedler and B.K.L. Genova. A consumer model for TV audiences: the case of TV violence. Communication research, v. 6, Apr. 1979: 181-202.

"A consumer behavior model is used to explore attitudes toward TV violence and censorship. Five viewing groups with distinct media use characteristics and TV attitudes were found in two separate samples. Findings suggest support for the anti-TV-violence campaign is not universal and that excessive violence is only one of four distinct viewer complaints about television programs." Other areas of dissatisfaction were objectionable content other than violence, low level programming and lack of sufficiently diverse programming.

Rossiter, John R. Does TV advertising affect children? Journal of advertising research, v. 19, Feb. 1979: 49-53.

Summarizes "the research evidence pertaining to the general effects of TV advertising on children, analyzed as cumulative-exposure effects (with age) and heavy-viewing effects (within age groups)." Finds that "exposure to TV advertising does not make children more cognitively or mentally susceptible to persuasion. ...Children's increasingly negative expressed attitudes toward TV advertising do not mean much."

Rothenberg, Michael B. Effect of television violence on children and youth. Journal of the American Medical Association, v. 234, no. 10, Dec. 8, 1975: 1043-1046.

Research findings concerning violence on television and its effects on children were summarized in regard to the "effects on learning, emotional effects, the question of catharsis, and the effects on aggressive behavior." The 1972 Surgeon General's report, "Television and growing up: the impact of televised violence" is also reviewed.

Rubinstein, Eli A. Television and the young viewer. American scientist, v. 66, Nov.-Dec. 1978: 685-693.

"The pervasive social influence of television on children is being increasingly documented, but has yet to be translated into a continuing and effective social policy."

Schneyer, Theodore J. An overview of public interest law activity in the communications field. Wisconsin law review, v. 1977, no. 3, 1977: 619-683.

Article is organized in three parts: "Part I introduces the citizens' groups, public interest law [PIL] firms, and government agencies which, in addition to the broadcasting and cable-TV industries, are the principal actors in communications regulation; Part II identifies several possible flaws in the unregulated and regulated delivery of radio and television services and analyzes a number of PIL initiatives as responses to these flaws; Part III concludes by developing guidelines for future PIL action in communications."

Schneyer, Theodore J. and Frank Lloyd. The public-interest media reform movement: a look at the mandate and new agenda. Palo Alto, Calif., Aspen Institute for Humanistic Studies, 1977.

Schuessler, Thomas L. FCC regulation of the network television program procurement process: an attempt to regulate the laws of economics? Northwestern University law review, v. 73, May-June 1978: 227-306.

Contents. -- History of network regulation. -- FCC investigation of program procurement. -- The network program procurement rules. -- Analysis of the Commissions' assumptions concerning concentration of economic control. -- Analysis of the Commission's assumptions concerning concentration of creative control. -- The program procurement rules. -- Conclusion.

Schweiker, William F. TV violence: does it affect our children? West Virginia University magazine, v. 4, no. 3, winter 1973: 2-4.

The author theorizes that children who have been frustrated before watching violence on television, will exhibit antisocial behavior after viewing. An experiment was conducted with 40 children in second and third grades. From their observations, the authors concluded that "some sort of interaction apparently occurs when a frustrated child sees violence on television, which combines to produce even more aggressiveness than either frustration or (television) violence alone." It was also found that children whose viewing habits are regulated, respond less aggressively, after watching televised violence, than those who watch very little.

Silk, John K. Midwest Video Corp. v. FCC: the First Amendment implications of cable television access. Indiana law journal, v. 54, fall 1978: 109-124.

Comment examines constitutional issues raised but not settled in a court of appeals' decision overturning FCC access rules for CATV. Concludes that "a constitutional sanction of the cable access rules depends upon a showing that the rules will in fact serve the cable television viewer's interests, that potentially less drastic means such as the fairness doctrine are inadequate to serve those interests, and that a level of governmental involvement inimical to the first amendment would not necessarily result."

Silverstein, Duane. TV comes to the courts. State court journal, v. 2, spring 1978: 14-19, 49-55.

"Questions concerning the use of cameras in the courtroom have been debated for more than forty years. For almost twenty of these years, Colorado was the only state to allow cameras to pass through the courthouse doors; however, the question is once again the focus of national attention. This article discusses the issues of televised trials and surveys the current situation."

Simmons, Steven J. The FCC's personal attack and political editorial rules reconsidered. University of Pennsylvania law review, v. 125, May 1977: 990-1022.

Article examines personal attack and political editorial rules under the FCC's fairness doctrine. The author concludes that "the personal attack rules should be repealed, but that, with some modifications, the political editorial rules, at least for the time being, should be retained."

----- The problem of "issue" in the administration of the fairness doctrine. California law review, v. 65, May 1977: 546-596.

"This article examines the FCC's regulatory role [concerning the fairness doctrine] and points out the confusion and inconsistencies surrounding this poorly administered policy. The author demonstrates the damaging effects of these problems on both the broadcasters and the viewing public, and recommends several immediate changes in the administration of the fairness doctrine." Examines the FCC's Accuracy in Media (pensions) and Rep. Patsy Mink cases.

Skornia, Harry J. The Great American teaching machine--of violence. Intellect, v. 105, April 1977: 347-348.

"TV provides 'marvelous lessons--the problem is that the lessons capitalize on skills of murder, arson, and robbery.'"

Snyder, Reynold J. Federal Communications Commission v. National Citizen's Committee for Broadcasting: FCC cross-ownership ban upheld. New England law review, v. 14, fall 1978: 337-369.

Case note details the underlying rationale of the FCC's order, discusses the First Amendment and antitrust issues raised in the case and analyzes the Supreme Court's resolution of the competing interests involved.

Somers, Anne R. Violence, television and the health of American youth. New England journal of medicine, v. 294, Apr. 8, 1976: 811-817.

Argues that one of the contributing factors to a youth culture of violence is television's daily diet of symbolic crime and violence and urges that the medical profession concern itself with this health hazard.

Sterling, Christopher H. and Timothy R. Haight. The mass media: Aspen Institute guide to communication industry trends. New York, Praeger, 1978. 457 p. (Praeger special studies in U.S. economic, social, and political issues published with the Aspen Institute Program on Communications and Society)

"This new Aspen guide is the first available sourcebook offering a comprehensive statistical overview of the American communications industries from 1900 to the present. The editors have gathered and analyzed statistical information on books, newspapers, magazines, motion pictures, recordings (disc and tape), radio (AM and FM), television, and cable from academic, industry, trade and government sources."

Stern, Robert H. The Federal Communications Commission and television: the regulatory process in an environment of rapid technical innovation. New York, Arno Press, 1979.

Stewart, James. FCC lacks authority to promulgate rules controlling content of cablecast programming unless such regulations promote objectives previously held valid in the regulation of broadcast programming. Catholic University law review, v. 27, winter 1978: 432-448.

Note discusses FCC authority to regulate cable television, focusing on Home Box Office, inc., v. FCC.

Straub, J. Kurt. Problems in the application of the fairness doctrine to commercial advertisements. Villanova law review, v. 23, no. 2, 1977-1978: 340-365.

Comment presents some early FCC opinions on the fairness doctrine as applied to commercial advertising, discusses the Banzhaf rule and its demise, and examines recent cases on editorial commercial advertisements.

Surgeon General's Scientific Advisory Committee on Television and Social Behavior. Television and growing up: the impact of televised violence; report to the Surgeon General, U.S. Public Health Service. Washington, U.S. Government Printing Office, 1972. 279 p.

"The conscientious effort by the committee to avoid an oversimplification of the problem has produced a document which may seem, at times, too technical. However, this report and the five volumes of research reports, which serve as a basis for the committee conclusions, make a major contribution to an understanding of the role of television in influencing the social behavior of children and young people."

Thain, Gerald. Suffer the hucksters to come unto the little children? Possible restrictions of television advertising to children under section 5 of the Federal Trade Commission Act. Boston University law review, v. 56, July 1976: 651-684.

Article explores the nature of concerns for the possible adverse impact of television commercials on child viewers and considers "the feasibility of, as well as the theoretical justification for, action by the Federal Trade Commission (FTC) under section 5 of the Federal Trade Commission Act to limit or prohibit certain television advertisements simply because they are directed to and viewed by large numbers of children."

Tyler, John. Government regulation of broadcasting. Columbia, School of Journalism, University of Missouri, 1977. 10 p. (Missouri University. Freedom of Information Center. Report no. 368)

"Supreme Court interpretations of the First Amendment have allowed congressional regulation of broadcasting. The author traces broadcast regulation from these Supreme Court decisions, examining the federal agencies that have been involved in regulation and the part played by the executive branch in telecommunications policy formulation."

U.S. Congress. Congressional record. Senate. A fariness doctrine debate. Vol. 120. Dec. 16,1974. Washington, U.S. Government Printing Office, 1974. S. 4007-40012.

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on Communications. Broadcast advertising and children. Hearings, 94th Congress, 1st session. Washington, U.S. Government Printing Office, 1976. 495 p.

"Serial no. 94-53"

Hearings held July 14-17, 1975.

Four days of hearings were designed to focus on the problem accompanied with broadcasting commercials on television directed toward children. During the hearings testimonies were given by Peggy Charren president of Action for Children's Television, Dr. Robert B. Choate, chariman of the Council on Children, Media and Advertising, Mr. John A. Schneider, president of CBS Broadcast Group, Mr. Richard E. Wiley, chariman of the Federal Communications Commission, Mr. Lewis A. Engman, chairman of the Federal Trade Commission, and Dr. Robert M. Liebert, director of Media Action Research Center, among several other authorities.

----- Cable television: promise versus regulatory performance. 94th Congress, 2d session. Washington, U.S. Government Printing Office, 1976. 110 p.

----- Cable television regulation oversight. Part 1. Hearings, 94th Congress, 2d session. Washington, U.S. Government Printing Office, 1977. 632 p.

"Serial no. 94-137"

Hearings held May 17 through Sept. 22, 1976.

----- Cable television regulation oversight. Part 2. Washington, U.S. Government Printing Office, 1976. 633-1325 p.

"Serial no. 94-138"

Hearings held May 17 through Sept. 22, 1976.

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on communications. The Communications Act of 1978. Vol. I. Hearings, 95th Congress, 2d session, on H.R. 13015. Washington, U.S. Government Printing Office, 1979. 686 p.
"Serial no. 95-194"

Hearings held July 18-21, 1978.
Four days of hearings on the general provisions; communications regulatory commission; administrative and judicial procedures; penalties; and miscellaneous provisions of the proposed revision of the Communications Act of 1934.

----- The Communications Act of 1978. Vol. II -- Part 1. Hearings, 95th Congress, 2d session, on H.R. 13015. Washington, U.S. Government Printing Office, 1979. 1188 p.
"Serial no. 95-195"

Hearings held July 25-27; Aug. 1-3 and 7-8, 1978.
Eight days of hearings on the general provisions; common carrier telecommunication and international common carrier provisions of the proposed revision of the Communications Act of 1934.

----- The Communications Act of 1978. Vol. II -- Part 2. Hearings, 95th Congress, 2d session, on H.R. 13015. Washington, U.S. Government Printing Office, 1979. 1166 p.
"Serial no. 95-196"

Hearings held Aug. 9-10, 14-16, 1978.

----- The Communications Act of 1978. Vol. III. Hearings, 95th Congress, 2d session, on H.R. 13015. Washington, U.S. Government Printing Office, 1979. 1312 p.
"Serial no. 95-197"

Hearings held Sept. 11-22, 1978.

----- The Communications Act of 1978. Vol. IV. Hearings, 95th Congress, 2d session, on H.R. 13015. Washington, U.S. Government Printing Office, 1979. 355 p.
"Serial no. 95-198"

Hearings held Sept. 26-28, 1978.
Three days of hearings on Title VI provisions (public telecommunications) of the proposed revision of the Communications Act of 1934.

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on Communications. Options papers. 95th Congress, 1st session. Washington, U.S. Government Printing Office, 1977. 664 p. Committee print no. 95-13.

Contents. -- Policy options for the spectrum resource. -- Broadcasting. -- Public broadcasting. -- Safety, special, and mobile radio communications. -- Domestic communications common carrier policy. -- International telecommunications -- Options for cable television regulation. -- The impact of communications technology on the right to privacy. -- Structural and procedural options for regulation of telecommunications.

----- Sex and violence on TV. Hearings, 94th Congress, 2d session. Washington, U.S. Government Printing Office, 1977. 378 p.

Hearings held on July 9; Aug. 17-18, 1976.
Three days of hearings on the issue of televised violence and obscenity.

----- Sex and violence on TV. Hearings, 95th Congress, 1st session. Washington, U.S. Government Printing Office, 1978. 481 p.

Hearings held Mar. 2, 1977.
One day hearing on the issue of televised violence and obscentiy.

----- Report together with additional, dissenting and separate views. Violence on Television. 95th congress, 1st session, Committee print. Sept. 29, 1977. Washington, U.S. Government Printing Office, 1977. 35 p.

A report about the history of "congressional action in the area of televised violence and the subcommittee's conclusions and recommendations."

U. S. Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Communications. The First Amendment Clarification Act of 1977. Hearings, 95th Congress, 2d session, on S. 22. Washington, U.S. Government Printing Office, 1978. 123 p.
"Serial no. 95-109."

Hearings held June 7, 1978.

U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Communications. Radio frequency interference. Hearing, 95th Congress, 2d session, on S. 864, to amend section 302 of the Communications Act of 1934 to authorize the Federal Communications Commission to prescribe regulations with respect to certain electronic equipment that is susceptible to radio frequency energy interference. Washington, U.S. Government Printing Office, 1978. 131 p.

Hearing held June 14, 1978.

----- Television broadcast policies. Hearings, 95th Congress, 1st session. Washington, U.S. Government Printing Office, 1977. 512 p.

Hearings held May 9, 10, and 11, 1977.
Three days of hearings on "oversight on television broadcast policies."

U.S. Congress. Senate. Committee on Commerce. Subcommittee on Communications. Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior. Hearings, 92d Congress, 2d session. Washington, U.S. Government Printing Office, 1972. 306 p.

Hearings held Mar. 21-24, 1972.
Statements and testimony were presented by Dr. Jesse Steinfeld, Surgeon General of the United States, some of the researchers who participated in the study, and other interested persons expressing their opinions of the Surgeon General's committee report on the effects of viewing televised violence on children, and its findings. Additional articles, statements, and letters, are also included for the record.

----- Violence on television. Hearings, 93d Congress, 2d session. Washington, U.S. Government Printing Office, 1974. 194 p.

Hearings held Apr. 3-5, 1974.
The hearings were called to examine the progress of HEW in working out a system of measuring the amount of violence being shown on television and that is viewed in the American homes. Testimonies were given by Bertram S. Brown, director of the National Institute of Mental Health, Dr. Eli Rubinstein, vice chairman of the committee preparing the Surgeon General's report along with other persons who have done research concerning this issue, and also representatives from ABC, CBS and NBC broadcast groups. It was reported that television programs had not shown any significant decrease in violence within the two years since the last hearings were held.

U.S. Department of Health, Education, and Welfare. National Institute of Mental Health. Television and social behavior, reports and papers, v. 1: media content and control. George A. Comstock and Eli A. Rubinstein, eds. Washington, U.S. Government Printing Office, 1972. (DHEW publication no. HMS72-9057) 546 p.

U.S. Department of Health, Education, and Welfare. National Institute of Mental Health. Television and social behavior, reports and papers, v. 2: television and social learning. John P. Murray, Eli A. Rubinstein and George A. Comstock, eds. Washington, U.S. Government Printing Office, 1972. 371 p.

----- Television and social behavior, reports and papers, v. 3: television and adolescent aggressiveness. George A. Comstock and Eli Rubinstein, eds. Washington, U.S. Government Printing Office, 1972. 435 p.

----- Television and social behavior, reports and papers, v. 4: television in day-to-day life; patterns of use. Eli A. Rubinstein, George A. Comstock, and John P. Murray, eds. Washington, U.S. Government Printing Office, 1972. 603 p.

----- Television and social behavior, reports and papers, v. 5: television's effects; further explorations. George A. Comstock, Eli A. Rubinstein, and John P. Murray, eds. Washington, U.S. Government Printing Office, 1972. 375 p.

U.S. Federal Communications Commission. Employment in the broadcasting industry, 1976. Washington, U.S. Government Printing Office, 1976. 790 p.

This fifth annual FCC study of employment practices in the broadcast industry covers the number of women and minority group employees. The report is divided into states and communities, showing stations with more than 10 full-time employees in each community. A further breakdown shows minority participation in terms of higher and lower pay categories.

----- Major matters before the Commission FCC. Washington, U.S. Government Printing Office, 1979. 123 p.

Section I contains the major items of FCC responsibility under appropriate Bureaus and Offices. Section II contains a detailed discussion covering the scope and magnitude of the problems involved and the progress that is being made toward their resolution.

U.S. General Accounting Office. The role of field operations in the Federal Communication's Commission's regulatory structure: report. Washington, U.S. Government Printing Office, 1978. 49 p.

"CED-78-151, Aug. 18, 1978"

"The Commission's field operations bureau has the responsibility of (1) enforcing the provisions of the Communications Act of 1934 and the Commission's rules and regulations and (2) serving as a liaison between the Commission and the public. This report notes areas where these operating activities can be strengthened and discusses how a greater integration of the bureau's activities into the Commission's regulatory structure can be achieved."

U.S. General Accounting Office. Selected FCC regulatory policies: their purpose and consequences for commercial radio and TV; report to the Congress by the Comptroller General of the United States. Washington, U.S. Government Printing Office, 1979. 231 p.
"CED-79-62, June 4, 1979"
Contents. ,- The broadcast licensinf process. -- Regulation of program service. -- Ascertainment of community problems, needs, and interests. -- Rules covering ownership of broadcast stations. -- Equal employment opportunity. -- Equal opportunity/fairness doctrine. -- Charging for use of the spectrum.

Urban Institute. Organization analysis of the regulatory process: a comparative study of the decision making process in the Federal Communications Commission and the Environmental Protection Agency. Washington, 1977. 1 v.
"NSF/RA-770411"
Contrasts and evaluates the regulatory processes of the FCC and EPA.

Voorhees, John. Development of new public interest standards in the Format Change Cases. Catholic University law review, v. 25, winter 1976: 364-379.
Comment explores the development of entertainment format regulation and the consequences of the court's decision in Citizen's Committee to Save WEFM v. FCC.

Walters, Ida. Deciding TV's future. Inquiry (San Francisco), v. 2, Feb. 5, 1979: 16-20.
"A rewrite of the communications law sparked debate that may undo the FCC's protection of TV station monopolies." Reviews and criticizes FCC policies concerning frequency allocation and localism.

Ward, Scott. Compromise in commercials for children. Harvard business review, v. 56, Nov.-Dec. 1978: 128-136.
"The Federal Trade Commission's 'kidvid rule' is the heaviest attack to date on children's television adveritising. In the recent war between consumer activists and regulatory agencies, on the one hand, and the TV advertisers, on the other, however, the real issues underlying the various charges against TV advertising for children are far from clear-cut, says this author. He points out that both sides of the controversy are adopting a political-legal approach that involves a costly and protracted battle, and he suggests a more rational alternative using research-based educational methods."

Watts, Meredith W. and David Sumi. Desensitization of children to violence? Another look at television's effects. Experimental study of politics, v. 5, Aug. 1976: 1-24.

Reports the results of a study "designed to test explicitly whether the predispositions of the viewer were more closely associated with automatic arousal than a gross measure of television exposure to violent programs."

Wattwood, Robert. FTC regulation of TV advertising to children--they deserve a break today. University of Florida law review, v. 30, fall 1978: 946-978.

Comment "discusses whether restrictions on children's advertising are socially, legally and economically justifiable. Initially, the public interest justification for the proposal and the statutory grounds upon which the Commission may base its proposed regulation are considered. Following this examination is a deliniation of the potential consititutional and economic problems confronting the proposal and the possible resolution of these problems."

Weinstein, Jack B. and Diane L. Zimmerman. Let the people observe their courts. Judicature, v. 61, Oct. 1977: 156-165.

Authors discuss the issues surrounding the televising of trials. The authors consider some of the reasons for the past prohibitions against televising court proceedings and examine the legal sentiments on that subject which have recently been expressed by the courts.

White, Daniel R. Pacifica Foundation v. FCC: "filthy words," the First Amendment and the broadcast media. Columbia law review, v. 78, Jan. 1978: 164-183.

Comment examines the Pacifica case and three established categories of offensive but non-obscene speech in which the Supreme Court has upheld some regulation. Concludes that "the unique accessibility of broadcast speech to unsupervised children does indeed warrant somewhat stricter regulation of broadcast speech than non-broadcast speech" and urges channeling objectionable forms of speech to late evening broadcasting.

Wilhelm, Michael J. UHF and the FCC: the search for a television allocations policy. University of Florida law review, v. 28, winter 1976: 399-438.

"This note charts the uneven course of the FCC in its attempt to provide an allocation plan to make optimum use of the available channels. The note then discusses the regulatory changes necessary to permit the FCC to carry out its mandate from Congress -- the provision requiring 'fair, efficient and equitable distribution of service.'"

William M. Young and Associates. The national PTA public hearing report on "The effects of televison on children and youth." Chicago National Congress of Parents and Teachers, 1977. 336 p.

Analyzes testimony from a wide cross section of the American public concerning the effect of television on children.

Wing, Susan. Morality and broadcasting: FCC control of "indecent" material following Pacifica. Federal communications law journal, v. 31, no. 1, winter 1978: 145-173.

In July, 1978, the Supreme Court for the first time allowed censure of a broadcast station for airing an "indecent" though not obscene program (a satirical monologue by comedian George Carlin entitled: "Filthy Words"). This article examines the decision and tries to define this new class of censurable material.

Wirth, Michael O. and James A. Wollert. Public interest program performance of multi-media-owned TV stations. Journalism quarterly, v. 53, summer 1976: 223-230.

"Analysis of FCC reports shows group-owned and multimedia-owned stations have at least as much news and public affairs programming as other stations."

Zuckerman, Paul and others. Children and TV commercials. Child development, v. 49, no. 1, Mar. 1978: 95-104.

"From videotype studies of children, aged 7 1/2 to 10 1/2 years old, watching a 15-minute television segment, the authors conclude: A consistent viewing pattern for commercials emerged. Attention was highest at the onset of a commercial and decreased rapidly after this. The appearance of a second commercial in a pair resulted in a further decline in attention. The decrease in attention was characteristic of all eight commercials, making it unlikely that a particular technique or approach was responsible for the drop in attention... Children of these ages are estimated to view approximately 20,000 commercials a year. It appears that children are so familiar with the content and techniques used in commercials that they rapidly habituate to them."

Part 2. Printed Media

Abrams, Floyd. The press, privacy and the Constitution. New York times magazine, Aug. 21, 1977: 11-13, 65, 68-71.
Reports on the growing number of suits brought against the press by plaintiffs objecting to the publication of even true statements about themselves, a development termed "the single most ominous threat to the First Amendment's guarantee of press freedom--the explosion of privacy law."

Anderson, Karen Gatsis. Attorney 'gag'rules: reconciling the First Amendment and the right to a fair trial. University of Illinois law forum, v. 1976, no. 3, 1976: 763-782.
Comment recommends a uniform framework, applied on a case-by-case basis, for use in courts to settle free press/fair trial conflicts. The author proposed "the standard that gag orders are impermissible in the absence of a serious and imminent threat to the criminal justice system."

Baer, Walter S., Henry Geller and Joseph A. Grundfest. Newspaper-television cross-ownership: options for Federal action. Santa Monica, California, Rand, 1974. 55 p.

Bagdikian, Ben H. First Amendment revisionism. Columbia journalism review, v. 13, May-June 1974: 39-46.
Reviews recent challenges to the press' conception of its traditional freedoms, focusing on assertions of a right of access to reply to press criticism -- the Tornillo case -- and judicial attempts to restrict coverage of court proceedings.

----- The media monopolies. Progressive, v. 42, June 1978: 31-34.
Argues that "our sources of news are increasingly controlled by a few conglomerate corporations." Discusses the size and influence of the large newspaper chains and press services.

----- The myth of newspaper poverty. Columbia journalism review, v. 11, Mar.-Apr. 1973: 19-25.
"The Hetty Green Syndrome is endemic among publishers: Act poor while growing rich. Meanwhile, editorial needs are neglected and the public interest suffers."

----- New[s]paper mergers -- the final phase. Columbia journalism review, v. 15, Mar.-Apr. 1977: 17-22.
Discusses instances which have led to the situation in American newspaper publishing today whereby large media corporations own chains of local papers, and the large chains are being taken over by larger companies. Discusses the ramifications of this situation and how this affects the free flow of news.

Bagdikian, Ben H. The press and its critics. The Washington post, July 16, 1972, p. B1-B2.

Analyzes and denies the validity of columnist Robert Novak's thesis of a "widening gap between the mass media and the great mass of citizens."

Batten, James K. Statement by James K. Batten, Group Vice President/News, Knight-Ridder Newspapers, to Select Committee on Small Business, United States Senate, holding hearings on economic concentration in the newspaper publishing industry. May 25, 1979.

Newspaper executive, in prepared testimony before Senate committee, asserts "bigness per se" is not bad for newspaper publishing. The "crucial fact," he maintains, is "that quality and public service are not at all functions of the size of a newspaper's owner, or of how many newspapers the company owns. They depend, instead, on the intentions, capabilities and performance of the owners."

The big money hunts for independent newspapers. Business week, no. 2471, Feb. 21, 1977: 56-60, 62.

"With cost pressures closing in on major metropolitan dailies, Times Mirror, Gannett, New York Times Co., and other publishing companies are buyuing up small- and medium-sized chains as well as independent papers to relieve a worsening profit squeeze, get the growth they need, and, above all, pick up some good properties before they are gone."

Blanchard, Margaret A. The Hutchins Commission, the press and the responsibility concept. Lexington, Ky., Association for Education in Journalism, 1977. 59 p. (Journalism monographs [Austin], no. 49)

Discusses the work of the Hutchins Commission on Freedom of the Press and the commission's report entitled "A free and responsible press."

Bollinger, Lee C., Jr. Freedom of the press and public access: toward a theory of partial regulation of the mass media. Michigan law review, v. 75, Nov. 1976: 1-42.

Article argues that Congress has the power under the First Amendment of regulating both print and broadcast media to the extent of facilitating public access.

Britton, Paul. The right to attend pretrial criminal proceedings: free press, public trial, and priorities in curbing pretrial publicity. Syracuse law review, v. 28, fall 1977: 875-921.

Comment examines the first and sixth amendment arguments for access by the press to pretrial hearings and argues that "there are serious impediments to successful constitutional attack on pretrial exclusion orders." Considers alternatives to exclusion orders for dealing with pretrial publicity and suggests "that the overriding policy that criminal justice be administered openly demands that exclusion orders be employed only when alternative measures short of gag orders would be inadequate to guarantee a fair trial."

Commission on Freedom of the Press. A free and responsible press. Chicago, University of Chicago Press, 1947. 138 p.

Self-appointed commission headed by Robert Hutchins undertakes a basic criticism of the press in the United States. Commission sets up criteria for a responsible press and finds the press falling short of these standards. Book generated widespread debate within the journalism profession over the extent to which the press was or should be "responsible" to society.

Czerniejewski, Halina J. Your newsroom may be searched. Quill, v.66, July-Aug. 1978: 21-25.

Discusses the background of the Stanford Daily v. Zurcher case, in which the Supreme Court ruled "that the press was no different from any person when it came to third-party searches." Considers the implications of this decision on the future of freedom of the press.

DeLesseps, Suzanne. News media ownership. Washington Editorial Research Reports, 1977, v. 1. no. 10: 185-202.

Contents. -- Concentration of news ownership. -- Areas of government involvement. -- Communications industry outlook.

Devol, Kenneth S. ed. Mass media and the Supreme Court -- the legacy of the Warren years. New York, Hastings House Publishers, 1976. 322-344 p.

Synopses the major Supreme Court cases concerning public access rights to both the print and broadcast media.

The First Amendment. Quill, v. 64, Sept. 1976: 16-45.

Articles discuss the history of the First Amendment; presents legal history of First Amendment rights; examines the perceived conflict between First and Sixth Amendment rights of fair trial and free press; lists significant Supreme Court decisions with regard to the First Amendment; considers the rights of the broadcast media; presents the positions of incumbent Supreme Court judges on First Amendment freedoms; and speculates about potential future threats and challenges to First Amendment freedoms.

Francois, William E. Mass media law and regulation. 2nd ed. Columbus, Ohio, Grid Inc., 1978. 616 p.

Franklin, Marc A. and Ruth Korzenik Franklin. The first amendment and the Fourth Estate: communications law for undergraduates. Mineola, N.Y., Foundation Press, 1977. 727 p.

A free and responsive press. New York, Twentieth Century Fund, 1973. 88 p.

Report of the Twentieth Century Fund Task Force for a National News Council and Background Paper by Alfred Balk. With twin concerns of preserving the freedom of the press and improving its performance, task force considers the need for a council to assess press performance on behalf of the public. Task force recommends establishment of a national council independent of both the government and news organizations.

Freedom, the courts, and the media. The Center Magazine, v. 12, Mar.-Apr. 1979: 28-45.

A discussion of the right of reporters to protect the confidentiality of their sources, by the following panel: Yale law professor Robert H. Bork and Floyd Abrams, counsel New York Times (lead-off panelists); Fred Graham, correspondent, CBS News; Anthony Lewis, columnist, New York Times; Sander Vanocur, Vice President, ABC News; L.A. Scot Powe, Jr. law professor, University of Texas; and Abe Fortas, former Justice, U.S. Supreme Court.

Bork cautions that the price for special privileges "may be disastrously high -- perhaps something like the fairness doctrine spread over the press at large." Abrams, however, argues the need ofr "some firm rules -- rules at least as firm as those that exist for other testimonial privileges that are not at all constitutionally rooted."

Freedom of the press -- fair trial -- gag orders. New York law school law review, v. 22, no. 3, 1977: 764-785.

Case note considers the constitutional issues in the Nebraska Press Association v. Stuart case. "Nebraska Press appears to stand for the proposition that prior restraints upon the publication of information relating to criminal cases which is derived from open court proceedings will never overcome constitutional barriers.... The Court has not yet abandoned the concept that some form of prior restraint might be appropriate in the event that all other protective measures could be shown to be clearly inadequate...."

Gormley, William T. Jr. How cross-ownership affects news-gathering. Columbia journalism review, v. 16, May-June 1977: 38-39, 42-43, 46.

Contends that "joint ownership of a newspaper and TV station in the same city often means less diversity in coverage." Focuses on the U.S. Court of Appeals decision which "struck down a two-year-old F.C.C. rule that allowed almost all the companies that already owned a newspaper and a broadcasting outlet in the same city to keep both...while prohibiting the future formation or transfer of cross-ownerships."

Harris, Richard. Gag orders on the press: a due process defense to contempt citations. Hastings constitutional law quarterly, v. 4, winter 1977: 187-218.

Comment "argues that in cases involving gag orders on the press due process requires an exception to the general rule [regarding criminal contempt.] Where obedience pending appeal would cause loss or diminution of a story's news value, the press should be able to print the news at its own risk, and to raise the invalidity of the underlying injunction in defense to a contempt citation."

Hentoff, Nat. A reckless disregard for a free press. Inquiry, v. 2, July 9 & 23, 1979: 9-11.

Considers the implications of the recent Supreme Court decision in Herbert v. Lando, on the future of freedom of the press in America. The Court held that "in libel suits brought by public figures, journalists can be compelled to reveal their 'state of mind' as they were researching and writing (or broadcasting) a story." Briefly reviews the details of the case which involved a CBS "60 Minutes" story about Colonel Herbert's treatment of the Vietnamese. Also discusses other cases involving the freedom of the press.

----- Stifling the Progressive. Inquiry (San Francisco), v. 2, May 14, 1979: 7-9.

Defends the Progressive's position in the Government's suit to keep it from publishing an article on hydrogen bomb technology, arguing that the case "involves the highest First Amendment stakes in the history of the republic."

----- Are there any defenses against a free, irresponsible press? Social policy, v. 7, May-June 1976: 50-53.

Discusses infringements of civil liberties resulting from pretrial publication of arrest records and other information. Suggests that the press is aided in the violation of civil liberties by the law enforcement agencies which leak information.

Higdon, Philip R. The Burger Court and the press. Columbia, School of Journalism, University of Missouri, 1979. 7 p. (Missouri University. Freedom of Information Center. Report no. 0020)

"Sees a trend toward restricting First Amendment rights and privileges in the results of cases involving the freedom of the press that have recently reached the Supreme Court."

Hill, Alfred. Defamation and privacy under the First Amendment. Columbia law review, v. 76, Dec. 1976: 1205-1313.

Article maintains that the common law has all along taken cognizance of the press freedom issue in libul and invasion of privacy cases, so that the Supreme Court need not always deal with cases, even though constitutional values are implicated.

Irvine, Reed. Press freedom doesn't guarantee a free society. Human Events, Mar. 5, 1977: 12-13, 20.

Argues that irresponsible press freedom may lead to the overthrow of all other freedoms, charges the U.S. press with contributing to the loss of American will, and asserts that the press must be kept from being manipulated into serving Communist and totalitarian propaganda.

Jones, Gregory Neill. Antitrust malaise in the newspaper industry: the chains continue to grow. St. Mary's law journal, v. 8, no. 1, 1976: 160-174.

Comment considers "the problem of ownership concentration by large newspaper chains as it pertains to antitrust law. As newspaper chains continue to grow, the concentration of economic power and the attendant potential of first amendment infringement necessitate an examination of the adequacy of present law to fulfill antitrust policy effectivdly."

Jones, William H. and Laird Anderson. The newspaper business. Washington post, July 24, 1977, p. G1, G3-G4, G-8; July 25, p. D10-D11; July 26, p. D7, D9; July 27, p. D9, D11; July 28, p. D13, D17; July 29, p. D7, D9; July 30, p. C8-C9; July 31, p. F1-F2; Aug. 1, p. D10-D11; Aug. 2, p. D7, D9; Aug. 3, p. D9, D13; Aug. 4, p. D1-D2.

Authors describe the growth and corporate management of large newspaper concerns and chains; economic concentration in the newspaper business; and the impact of technological innovations on the newspaper industry.

Kahane, Dennis S. Colonial origins of our free press. American Bar Association journal, v. 62, Feb. 1976: 202-206.

Details incidents in which the colonial American press came into conflict with the government regarding issues of freedom of the press.

Kampelman, Max. The power of the press: a problem for our democracy. Policy review, v. 6, fall 1978: 7-39.

Author analyzes the rights and responsibilities of the news media, their power and abuses of power. He asserts that while other powerful institutions in the United States, including the three branches of the Federal Government, "are required to exercise their power responsibly," the press "is characterized by few, if any effective restraints." The press, he suggests, should be accountable for abuses of its power, and his recommended reforms include an effective anti-trust program to ensure genuine competition without infringing editorial freedom, a professional code of ethics similar to that adhered to by the American Bar Association, an independent press council and independent internal ombudsmen.

----- The arrogance of the press. Washingtonian, v. 10, Oct. 1974: 61-62, 64, 66, 68, 70.

Questions the accuracy and reliability of the American press and calls for legislation to limit its power; claims that the uncovering of the Watergate affair was not primarily the work of the press but the result of government investigation.

Kelly, Margie. The Supreme Court's search ruling. Columbia, School of Journalism, University of Missouri, 1979. 7 p. (Missouri University. Freedom of Information Center. Report no. 403)

Examines the Supreme Court decision in Stanford Daily v. Zurcher. "While some have termed the Supreme Court's search ruling a 'constitutional outrage,' others say the press is overreacting. Both sides of the issue are explored in this report, which looks at how search warrants might affect the press and other third parties, what legislation has been proposed, and how newspapers might protect themselves."

Kennedy, George. Processing of the beefs. Quill, v. 65, Oct. 1977: 26-27

Author describes court-like hearings of the Minnesota Press Council on public complaints filed against newspapers. Although the council has no power to enforce its judgements or impose its standards, it sends copies of its decisions to offending papers with the recommendation that its findings be published. Nearly all papers concerned have complied with the recommendation, author reports.

Kirsch, Jonathan. Publish and be damned. New West, v. 4, July 2, 1979: 36, 38-40, 42, 44-47.

Discusses the conflict which has arisen in this country between the press and the courts, focusing on Chief Justice Burger's attitudes about the press and how these attitudes affect the Court's decisions concerning the press. Considers the First Amendment implications of this conflict.

Kleinfield, N.R. The great press chain. New York times magazine, Apr. 8, 1979: 41-42, 44, 48-50, 52, 59-60, 63.

Describes the Gannett newspaper chain which publishes approximately 78 local daily newspapers across the country. "The chain has doubtlessly done more to change the nature of how America's newspapers are owned than any other company. Not that long ago, most papers were independently owned; today, all but around 500 belong to one or another of 167 newspaper groups."

Kriss, Ronald P. The National News Council at age one. Columbia journalism review, v. 13, Nov.- Dec. 1974: 31-38.

Surveys the accomplishments of the National News Council since its establishment on Aug. 1, 1973.

Landau, Jack C. Fair trial and free press: a due process proposal: the challenge of the communications media. American Bar Association journal, v. 62, Jan. 1976: 55-60.

Discusses restrictions which have been placed upon the media with regard to reporting on courtroom proceedings. Paul H. Roney of the ABA Legal Advisory Committee on Fair Trial and Free Press discusses (p. 60-64) the proposal pending before the ABA House of Delegates which "would provide notice and a hearing to all parties, including the news media, when a judge is considering the entry of a fair trial--free press judicial restrictive order." Includes text of that proposal.

Law and the media. St. Louis University law journal, v. 20, no. 4, 1976: 610-662.

Contents. — Leaked information as property: vulnerability of the press to criminal prosecution, by E. Dennis. -- Time, inc., v. Firestone: more than a new public figure standard? by D. McKenna. — Free press-fair trial controversy: using empirical analysis to strike a desirable balance, by S. Nagel, K. Reinbolt, and T. Eimermann. -- Nebraska Press Association v. Stuart; have we seen the last of prior restraints on the reporting of judicial proceedings? by E. Prettyman, Jr.

Litwack, Thomas R. The doctrine of prior restraint. Harvard civil rights-civil liberties law review, v. 12, summer 1977: 519-558.

Article maintains "that any definition of prior restraint that limits the concept to prepublication restrictions upon expression is supported neither by the rationale for the prior restraint doctrine nor the Supreme Court's prior restraint cases. ...It argues that any government action that significantly curtails the dissemination of information and ideas prior to an adequate determination that the materials are unprotected by the first amendment is a prior restraint."

Louis, Arthur M. Independent dailies are an endangered species. Fortune, v. 97, June 19, 1978: 160-164, 166.

"Chain newspapers are gobbling them up by offering dazzling prices, but some doughty owners vow to hang on and preserve local control."

Lowenstein, Ralph L. National News Council appraised. Columbia, School of Journalism, University of Missouri, 1974. 9 p. (Missouri University. Freedom of Information Center. Report no. 0015)

Opinion paper on the National News Council's first year of operation finds that the organization has attracted few substantive complaints. The author also sees sloppy procedures and ill-advised rule changes as difficulties.

----- Press councils: idea and reality. Columbia, School of Journalism, University of Missouri, 1973, 22 p. (Missouri University. Freedom of Information Center. Report no. 1)

Partial contents. -- The press council idea in America. -- Press councils abroad. -- The Twentieth Century Fund proposal. -- Reaction to the Twentieth Century Fund proposal. -- Arguments for and against a National Press Council.

Mathias, Charles McC., Jr. Zurcher: judicial dangers and legislative action. Trial, v. 15, Jan. 1979: 40-43.

U.S. senator discusses the background of the Stanford Daily v. Zurcher case, which "arose out of a search of the Stanford University student newspaper office in 1971." Discusses some of the legislative issues relating to this case which the 96th Congress will consider.

McIntosh, Toby J. Why the government can't stop press mergers. Columbia journalism review, v. 16, May-June 1977: 48, 50.

Contends that "unless antitrust laws are rewritten, the Justice Department has only a shaky case against the growth of large press chains."

Merrill, John Calhoun. The imperative of freedom: a philosophy of journalistic autonomy. New York, Hastings House, 1974. 227 p. (Hastings House special studies in public communication)

Author reflects on the role of the press in the United States, and identifies at the outset a central theme running through the book: "that American journalism is becoming so institutionalized and professionalized and so immured with the nascent concept of 'social responsibility,' that it is voluntarily giving up the sacred tenet of libertarianism -- 'editorial self-determinism'-- and is in grave danger of becoming one vast gray, bland, monotonous, conformist spokesman for some collectivity of society."

Merrill, John C. and Ralph L. Lowenstein. Media, messages, and men: new perspecitves in communication. New York, David McKay Co., 1971. 293 p.

Authors examine the changing roles of the news media in the United States and elsewhere. Chapter topics include various approaches to evaluation of news media performance and the forms in which news media in the United States are subject to government regulation.

"Monitoring" national news suppliers -- 2. questions and answers. Columbia journalism review, v. 11, Mar.-Apr. 1973: 47-52.

Excerpts of the press conference accompanying and discussing the release of the Twentieth Century Fund Task Force report suggesting the establishment of a National News Council.

Morrison, David. The theory of probable cause and searches of innocent persons: the Fourth Amendment and Stanford Daily. UCLA law review, v. 25, Aug. 1978: 1445-1494.

Comment sets forth "three views of the theory underlying the probable cause requirement of the fourth amendment. In Stanford Daily, the Court reaffirmed its commitment to the accepted cost-benefit theory and allowed searches of innocent parties on the same probable cause showing required for a suspect to be searched. If the analysis of the accepted probable cause standard presented here is correct, the holding should also mean that arrests of material witnesses are constitutional without any showing that a subpoena is impracticable."

Murphy, William P. The prior restraint doctrine in the Supreme Court: a reevaluation. Notre Dame lawyer, v. 51, July 1976: 898-918.

Article reviews "the Court's use of the prior restraint doctrine and...propose[s] a more realistic definition of a prior restraint... recommend[s] that judicial responsiveness to the substance rather than the form of a prior restraint would render the doctrine more reasonable, and beneficial in the protection of first amendment rights."

National News Council. NNC appraises an appraisal. Columbia, School of Journalism, University of Missouri, 1975. 6 p. (Missouri University. Freedom of Information Center. Report no. 0017)

Staff of the National News Council rebuts criticisms of the organization's first year in operation.

----- In the public interest: a report. New York, 1975. 164 p. "This report covers the period August 1, 1973, through July 31, 1975."

Partial contents. -- Complaints handled by the Council. -- Complaints and their meaning. -- Complaints handled by staff. -- The Council's by-laws. -- The Council rules of procedure.

The National News Council: a sampling of comment. Columbia journalism review, v. 11, Mar.-Apr. 1973: 56-57.

Sampling of editorial opinion.

Nebraska Press Association v. Stuart: symposium. Stanford law review, v. 29, Feb. 1977: whole issue.

Partial contents. -- The defense of fair trial from Sheppard to Nebraska Press Association: benign neglect to affirmative action and beyond, by S. Portman. -- Principle and Nebraska Press Association v. Stuart, by R. Sack. -- Nebraska Press Association: an expansion of freedom and contraction of theory, by B. Schmidt, Jr. -- The voice of the grass: Erwin Charles Simant's efforts to secure a fair trial, by J. Shellow. -- Fair trial and free press: the practical dilemma. -- The press ungagged: the practical effect on gag order litigation of Nebraska Press Association v. Stuart, by J. Goodale. -- Does the court's decision in Nebraska Press Association fit the research evidence on the impact of jurors of news coverage? by R. Simon. -- Nebraska Press Association: an open or shut decision? by S. Barnett. -- Fair trial and free press: an opportunity for coexistence, by R. Isaacson. -- Gag orders: cui bono? by C. Gary and D. Riordan. -- Some thoughts on the defense of publicity cases, by E. Younger. -- Prior restraint on freedom of expression by defendants and defense attorneys: ratio decidendi v. obiter dictum, by M. Freedman and J. Starwood.

Pember, Don R. Mass media law. Dubuque, Iowa, W.C. Brown Co., 1977. 484 p.

Powell, Cheryl Riley. The reporter's control of news. Columbia, School of Journalism, University of Missouri, 1978. 6 p. (Missouri. University. Freedom of Information Center. Report no. 395)

"The American reporter is an important source of what is determined to be news. By the nature of his background, his personal characteristics, the pressures of his job, his ethical stance and his personal life, he exerts considerable control over the information he disseminates."

The power of the FCC to regulate newspaper-broadcast cross-ownership: the need for congressional clarification. Michigan law review, v. 75, Aug. 1977: 1708-1731.

Comment suggests that the FCC might be exercising more authority in its newspaper-broadcast cross-ownership regulation than Congress intended. Notes the lack of guidance furnished by the legislative history of the Communications Act of 1934.

The press and the courts: competing principles. Washington, American Enterprise Institute for Public Policy Research, 1978. 37 p. (AEI forum 23)

This edited transcript of an AEI Public Policy Forum examines the role of the press in America. Participants discuss the competing interests of the news media, the government, and the public, including a defendant's right to a fair trial and the press' need to protect confidential sources.

The press and the courts: is news gathering shielded by the First Amendment? Columbia journalism review, v. 17, Nov. - Dec. 1978: 43-50.

This report discusses recent arguments between journalists and the courts, in which "journalists are claiming constitutional protection for their sources; judges say reporters are placing themselves above the law." Presents excerpts from the decisions in three legal cases (Zurcher v. Stanford Daily, Reporters Committee v. American Telephone and Telegraph, and In the Matter of Myron Farber and the New York Times Company) involving First Amendment issues and also reprints "selections from the discussion that the decisions have inspired."

Press freedoms under pressure. New York, Twentieth Century Fund, 1972. 193 p. (Twentieth Century Fund. Report of the Twentieth Century Fund Task Force on the Government and the Press and Background Paper by Fred P. Graham)

Task force examines questions of subpoenas, law-enforcement agents posing as newsmen, official harassment of the "underground press," government criticism and investigations of news judgments, and the efforts of the Nixon Administration to halt publication of the Pentagon Papers.

Press, politics and popular government. Washington, American Enterprise Institute for Public Policy Research, 1972. 52 p. (American Enterprise Institute for Public Policy Research. AEI domestic affairs studies study 3)

Study presents five journalists and scholars in a wide-ranging discussion of such questions as these: Is the press a "surrogate sovereign" in our democracy? Should an "adversary relationship" prevail between the press and government? Do the news media reflect bias? Are American journalists sufficiently expert to report today's increasingly complicated news?

The press and public policy. Washington, American Enterprise Institute for Public Policy Research, 1979. 43 p. (American Enterprise Institute for Public Policy Research. AEI forum 27)

"The edited transcript of a televised AEI Public Policy Forum, examines the influence of the media on public policy making in the United States. Among the questions debated by the panel members are: Do the media, in reporting the actions of political institutions, nurture a broad public awareness that helps shape public policy, or do the media actually generate policy themselves? Do the media give adequate coverage to economic issues, such as inflation and monetary policy, which are becoming increasingly technical and complex? Does the public consider the media fair and balanced, or does it often find ideological bias in media coverage? Have the media, by bringing political candidates to the public's attention, usurped a traditional role of political parties? And should an independent agency be created which would appraise and report on press coverage, thereby making the media more accountable to the public? John Charles Daly, former ABC News chief, serves as moderator for the panel."

Publishing, perishing and the First Amendment. APF reporter, v. 2, May 1, 1979: 1-20.

"The United States v. The Progressive is ... [one] hard and tough case, now before the Seventh Circuit Court of Appeals, which is causing journalists to ask themselves whether they accept any prior restraint from the government when it comes to the publication of 'secrets' which may or may not be really secret. Twenty-nine editors, scientists, government people, lawyers, and reporters were invited by the Alicia Patterson Foundation to convene in New York on April 17 and thrash out this issue, ...It was a conference where Professor Albert Carnesale of Harvard said that while no wise person believes everything ought to be secret, perhaps there ought to be some secrets on earth, and perhaps the blueprint for the H-bomb ought to be among those. Benjamin Bradlee of the Washington Post complained that he felt 'cornered' into supporting Erwin Knoll's right to publish. Lee Marks, attorney for the Department of State, commented that he prefers to be on the other side of First Amendment issues, but that this case is isolated and unique."

Ranney, James T. Remedies for prejudicial publicity: a brief review. Villanova law review, v. 21, Oct. 1976: 819-838.

Article considers the fact that "the whole area of prejudicial publicity has not lent itself to many clear-cut rules...both in terms of defining the problem and in terms of divising appropriate remedies." Discusses remedies, which include the restriction of public statements and press publication, exclusion of the public from pretrial hearings, change of venue and more careful control of activities near the courtroom.

Rehnquist, William H. The First Amendment: freedom, philosophy, and the law. Gonzaga law review, v. 12, fall 1976: 1-18.

Justice Rehnquist discusses the right to speak and to publish from two perspectives: as a protected right because of the benefits to society at large and as an inherent right. Concludes that unresloved questions as to where the boundaries of this right shall be drawn will always exist in a country which recognizes the importance of these freedoms and the demands of an ordered society.

Ritter, John A. and Matthew Leibowitz. Press councils: the answer to our First Amendment dilemma. Duke law journal, v. 1974, Dec. 1974: 845-870.

"Two major press councils are now functioning in the United States, the Minnesota Press Council and the National News Council. An examination of their procedures and decisions demonstrates that the press council mechanism can foster a fair and responsible press while upholding the First Amendment's guarantee of a free press."

Ruckelshaus, William and others. Freedom of the press. Washington, American Enterprise Institute for Public Policy Research, 1976. 101 p.
"An AEI Round Table held on July 29 and 30, 1975 at the National Press Club, Washington, D.C."
Part 1 --"First Amendment protections," moderated by William Ruckelshaus; part 2 -- "Regulation of the media," moderated by Elie Abel.

Sanoff, Alvin P. America's press: too much power for too few? U.S. news and world report, v. 83, Aug. 15, 1977: 27-33.
Examines the publishing industry in America, focusing on the recent concern over the incorporation of newspaper chains by larger newspaper publishing operations. Also investigates the extent of cross-media ownership by large publishing corporations. Notes the growing concern that fewer and fewer people will influence what the public reads.

Shaw, David. Newspapers can dish it out, but can they take it? New York, v. 9, Nov. 15, 1976: 63-66.
"Los Angeles Times" reporter discusses reasons for the often hostile reaction by members of the press to his newspaper series on the future of urban dailies, newspaper coverage of various events, and the effectiveness of advertising in newspapers.

Silver, Michael. Free enterprise, free press: the crucial connection. New guard, v. 19, spring 1979: 16-18.
Maintains "that much of the freedom exercised by the press in this country is made possible by the natural functioning of the free enterprise system."

Stone, Marvin L. Appetite for mergers: conglomerates and the media. USA today, v. 107, Sept. 1978: 10, 12-13.
The editor of U.S. news and world report comments on trends toward concentration and conglomerate ownership in newspaper publishing and suggests that "as journalism becomes more and more of a corporate enterprise, the counting house will play an ever larger role, the editor's office an ever smaller one."

Sullivan, Paul W. News piracy: unfair competition and the misappropriation doctrine. Lexington, Ky. Association for Education in Journalism, 1978. 31 p. (Journalism monographs [Austin], no. 56)
"Unfair competition is a complex problem affecting all areas of American business, including the communications media. Piracy of material, an alarmingly widespread manifestation of unfair competition, involves legal as well as ethical questions. This monograph uses the historical approach to trace the development of common law precendent and trends, then summarizes, analyzes and evaluates current unfair competition cases."

The Supreme Court and the press. News media and the law, v. 3, Jan. 1979: whole issue.

Presents summaries of 68 significant Supreme Court decisions in the 1977-1978 and 1978-1979 terms involving confidential sources, gag orders and closed trials, broadcasting, libel and privacy, freedom of information, and prior restraints.

Thrift, Ralph R., Jr. How chain ownership affects editorial vigor of newspapers. Journalism quarterly, v. 54, summer 1977: 327-331.

"Study of matched groups of chain and independent papers on West Coast shows chain papers have fewer argumentative editorials in controversial contexts on local topics."

Trial secrecy and the First Amendment right of public access to judicial proceedings. Harvard law review, v. 91, June 1978: 1899-1924.

Comment "argues that the free press/fair trial impasse which has hampered fruitful discussion of trial secrecy can be avoided by focusing on the public interest in open trials. By examining the role of courts in our society and the common law tradition of open trials, the ... [comment] expounds a first amendment right of public access which must be carefully considered before any restrictions on access are imposed. In addition, the... [comment] provide[s] guidance as to how courts should determine the limited class of cases in which a sufficient showing may be made to justify overriding the right of public access."

U.S. Congress. House. Committee on Government Operations. Search warrants and the effects of the Stanford Daily decision: twenty-seventh report, together with additional views. Washington, U.S. Government Printing Office, 1978. 20 p. (95th Congress, 2d session. House. Report no. 95-1521).

U.S. Congress. House. Committee on Government Operations. Government Information and Individual Rights Subcommittee. Justice Department policy concerning news media search warrants. Hearing, 95th Congress, 2d session. Washington, U.S. Government Printing Office, 1978. 270 p.

Hearing held June 26, 1978.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. Fair trial and free expression: a background report. 94th Congress, 2d session. U.S. Government Printing Office, 1976. 85 p.

"This report on fair trial and free expression was undertaken at the request of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. Its purpose is to explore fair trial-free expression issues and to aid the Subcommittee in determining whether hearings or legislation would be useful. The report considers relevant case law, proposals, and reports (such as those of bar associations and other groups) and offers commentary and recommendations for the Subcommittee's consideration."

Watkins, John J. Newsgathering and the First Amendment. Journalism quarterly, v. 53, autumn 1976: 406-416, 493.

"Supreme Court has not dealt directly with question of a right of newsgathering. Decisions seem to deny in part that there is such a right, but Court may have left door open for positive ruling."

Part 3. Other Forms of Media (e.g., film, satellites, data transmission)

Anderson, George M. Alcohol and advertising. America, v. 139, Oct. 14, 1978: 238-240.

"The beverage industries contend that their promotion campaigns are designed only to familiarize consumers with brand names. There is as yet little information on their actual effects on drinking habits."

Anderson, Howard. IBM versus Bell in telecommunications. Datamation, v. 23, May 1977: 91-93, 95.

"Bell's battle plan [Bell Telephone] is to have the eutire telecommunications territory legally declared 'off limits to all but communications carriers.' IBM's counterattack is to become a carrier. Every user has a stake in the outcome."

Bayus, Elaine. The constitutional status of commercial expression. Hastings constitutional law quarterly, v. 3, summer 1976: 761-801.

Comment concludes that "after Bigelow, and particularly after Virginia Citizens, the approach is now to begin with the premise that commercial expression is as protected by the First Amendment as other forms of expression, and then to inquire into whether there is any overriding social reason why a particular instance of commercial speech should be regulated or prohibited."

Blind bidding and the motion picture industry. Harvard law review, v. 92, Mar. 1979: 1128-1147.

Comment analyzes the legal and economic issues raised by blind bidding for motion pictures. Describes the sources of market power in the industry, assesses the effects of blind bidding and their relationship to market power and examines the constitutional objections to state regulation of blind bidding. Concludes that such regulation is unwise.

Bluem, A. William, and Jason E. Squire. The movie business, American film industry practice. New York, Hastings House Publishers, 1972. 368 p.

Cook, Mary B. The censorship of violent motion pictures: a constitutional analysis. Indiana law journal, v. 53, no. 2, 1977-1978: 381-398.

Comment concludes that the inconclusiveness of social science research regarding the effect of violent movies on behavior and the absence of articulated precedent argue against placing film violence in a new category of nonprotected expression.

Crombie, Douglass D. Lowering barriers to telecommunications growth. Washington, U.S. Office of Telecommunications for sale by the Supt. of Docs., U.S. Government Printing Office, 1976. 1 v. (U.S. Office of Telecommunications. OT special publication 76-9).

"The report briefly summarizes the status of four technologies: direct satellite communications, land mobile radio, broadband communications networks, and fiber optic communications."

Eckinger, Robert D. First Amendment restrictions on the FTC's regulation of advertising. Vanderbilt law review, v. 31, Mar. 1978: 349-373.

Contents. -- Regulation of advertising by the FTC. -- First Amendment protection of commercial speech. -- Recent judicial developments affecting the FTC's regulation of advertising. -- Comparison and analysis of recent judicial trends. -- Conclusion.

Guback, Thomas H. and Dennis J. Dombkowski. Television and Hollywood: economic relations in the 1970's. Journal of broadcasting, v. 20, fall 1976: 511-527.

"Described in some detail here is the increasingly close economic tie between the 'old' Hollywood film business and the 'new' television programming production business located in the same area -- and using the same people, facility, and funding."

Houdek, Frank G. and William T. Ford. The motion picture industry and the law: a practicioners guide to the literature. Los Angeles, Los Angeles County Law Library, 1977. 17 p.

Contents. -- Books. -- Practising Law Institute program materials. -- USC Entertainment Law Institute materials. -- Law review articles. -- Antitrust. -- Censorship, ratings and regulation. -- Copyright and related problems. -- Financing and production. -- Performer's rights. -- Taxation.

Kalba, Konrad K. and others. Electronic message systems: the technological, market and regulatory prospects. Cambridge Kalba Bowen Associates, 1978. 1 v.

"Report provides an overview of the current status and future prospects of electronic message systems and services (EMS) in the United States. It examines technological and service alternatives, cost and market estimates, and the policy and regulatory issues raised by EMS."

Killingsworth, Vivienne. Corporate star wars: AT&T vs. IBM. Atlantic, v. 243, May 1979: 68-75.

Examines developments in data transmission systems and discusses the competition between IBM and AT&T to provide the equipment and technology to transmit and receive all kinds of data. Examines the regulatory issues involved and cites conflicts between AT&T's regulated position regarding transmission and the computer and equipment industry's nonregulated environment.

Levy, Steven A. Private diplomacy and public business: public supervision of the Communications Satellite Corporation. Univeristy of Chicago law review, v. 45, winter 1978: 419-449.

"This comment examines the statutory accommodation of the functions of Comsat, the FCC, and the Executive, focusing particularly upon the extent to executive branch power to supervise Comsat's international activities. Its thesis is that the Executive has exceeded its supervisory powers by dictating Comsat's position on technical and operational matters arising in the course of Comsat's activity within INTELSAT, the international organization established in 1964 to own and operate the global satellite system."

Merrill, Thomas W. First Amendment protection for commercial advertising: the new constitutional doctrine. University of Chicago law review, v. 44, fall 1976: 205-254.

"This comment will examine the constitutional status of commercial advertising before and after Bigelow and Virginia Board of Pharmacy, and will argue that a distinction between commercial and noncommercial speech remains valid. The comment will then analyze the difficulties of defining commercial speech and advocate that courts adopt a definition based on the lower first amendment value the Supreme Court has found in commercial speech."

Minus, Johnny and William Storm Hale. Your introduction to film-T.V. copyright, contracts, and other law. Hollywood, California, 7 Arts Press, 1973. 232 p.

Robinson, Glen O., ed. Communications for tomorrow: policy perspectives for the 1980s. New York, Praeger, 1978. 526 p.

Partial contents. — Communication policy in an information society, by M. Porat. -- Telecommunications technology in the 1980s, by W. Baer. -- Boundaries to monopoly and regulation in modern telecommunications, by L. Johnson. -- International telecommunication regulation, by H. Goldberg. — Pluralistic programming and regulatory policy, by B. Schmidt. -- Telecommunications technologies and services, by W. Lucas. — Communications for a mobile society, by R. Bowers. — Electronic alternatives to postal service, by H. Geller and S. Brotman. -- Government institutions and policymaking processes in communications. -- Communications for the future: an overview of the policy agenda, by G. Robinson.

Sponsored by the Project on Communications Policy of the Aspen Institute for Humanistic Studies.

Schlafly, H.J., R.E. Button and B.L. Wormington. The initial growth and expanding opportunities of U.S. domestic satellite service. Washington, U.S. National Telecommunications and Information Administration, 1979. 149 p.

"This report charts the growth of U.S. Domestic Satellite Communications during the first years of earth terminal proliferation with emphasis on the compatibility of satellite and cable as a total communications system."

Smith, Lee. The Domsat war gets tougher and costlier. Dun's review, v. 109, May 1977: 72-75.
Describes the competition over the data transmission business in the United States, centering on the use of domestic communication satellites.

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on Communications. Competition in the telecommunications industry. Hearings, 94th Congress, 2d session. Washington, U.S. Government Printing Office, 1977. 1331 p.
"Serial no. 94-129"

Hearings held Sept. 28-30, 1976.

----- International Maritime Satellite Act. Hearing, 95th Congress, 2d session, on H.R. 11209. Washington, U.S. Government Printing Office, 1978. 130 p.
"Serial no. 95-101"

Hearing held April 4, 1978.

U.S. Congress. House. Committee on Post Office and Civil Service. Subcommittee on Postal Operations and Services. Impact of electronic communications systems on postal operations. Hearings, 95th Congress, 1st session. Washington, U.S. Government Printing Office, 1978. 86 p.
"Serial no. 95-76"

Hearings held April 6 and May 5, 1977.

U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Communications. Domestic telecommunications common carrier policies. Hearing, 95th Congress, 1st session. Part 1. Washington, U.S. Government Printing Office, 1977. 820 p.

Hearings held March 21-22, 1977.

----- Domestic telecommunications common carrier policies. Hearings, 95th Congress, 1st session. Part 2. Washington, U.S. Government Printing Office, 1977. 821-1376 p.

Hearings held May 23 and 28, 1977.

----- International Maritime Satellite Telecommunications Act; report to accompany H.R. 11209. 95th Congress, 2d session. Washington, U.S. Government Printing Office, 1978. 26 p.
Report no. 95-1036

U.S. General Accounting Office. Greater coordination and a more effective policy needed for international telecommunications facilities; report by the Comptroller General of the United States. Washington, 1978. 75 p.

"CED-78-87, Mar. 31, 1978"

Reviews "the coordination among the Federal Communications Commission; the Office of Telecommunications Policy; the Office of Telecommunications, Department of Commerce; and the Department of State in implementing the proper oversight of international telecommunications."

C. HOW TO SECURE ADDITIONAL INFORMATION ON THE REGULATION OF THE MASS MEDIA

TION

1. BOOKS AND ARTICLES

In order to be aware of the latest books and magazine, periodical, and newspaper articles on regulation of the mass media the debater may wish to consult such indexes as the *Reader's Guide to Periodical Literature*, a guide to general and non-technical periodicals; the *Bulletin of the Public Affairs Information Service*, a subject list of the latest books, pamphlets, governmental publications, reports of public and private agencies, and periodical articles; and the *International Index to Periodical Literature in the Social Sciences and Humanities*, an index to select American and foreign journals. The *Book Review Digest* offers a subject index to reviews of current books appearing in selected periodicals. The *New York Times Index*, the *Wall Street Journal Index*, and the *Christian Science Monitor Index* are relatively long-standing indexes to newspaper articles. More recently, the Bell & Howell Newspaper Indexing Center has compiled indexes for the Chicago *Tribune*, the Houston *Post*, the Los Angeles *Times*, the New Orleans *Times-Picayune*, the San Francisco *Chronicle*, and the Washington *Post*.

2. GOVERNMENT PUBLICATIONS

Additional sources of valuable information on regulation of the mass media are hearings and debates in Congress. The "Monthly Catalog of United States Government Publications," issued by the Govrnment Printing Office, provides an index to Congressional hearings, reports, documents, and committee prints, as well as to publications from the Executive departments. The Federal Communications Commission, and the National Telecommunications and Information Administration of the Department of Commerce, are two Executive agencies which would be of particular interest to researchers in the media. Within the catalog, Congressional publications are arranged by committee and the documents are in turn indexed in the back of the volume by subject. The Congressional Information Service Index to Publications of the United States Congress provides abstracts of Congressional documents.

If documents listed in the Monthly Catalog are not available at your local library consult your librarian who can tell you the location of the nearest depository library which has them or initiate an interlibrary loan for you. There are over 1,300 Government depository libraries throughout the country which have been designated to receive large collections of Government publications. If the documents are still not available, they may be obtained, if still in print, by writing directly to the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

The Congressional Record contains Congressional debates as well as relevant articles and speeches. Accordingly, it is a valuable source of information. It appears daily during the sessions of Congress with an index which is issued approximately every two weeks. At the end of a session, bound volumes of The Record are published, one of which contains an index covering the complete session. The researcher should be alert to the fact that pagination differs for the daily and bound editions of The Record.

D. AVAILABLE GOVERNMENT PUBLICATIONS RELATING TO THE 1978–80 INTERCOLLEGIATE DEBATE TOPIC

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PUBLICATIONS RELATING TO THE 1979-80 COLLEGE DEBATE TOPIC

* * *

___That the Federal Government Should Significantly Strengthen the Regulation of Mass Media Communication in the United States. 1979.
S/N 052-071-00598-6

* * *

___Age Stereotyping and Television, Hearing Before the House, Select Committee on Aging, 95th Congress, 1st Session, September 8, 1977.
1977. 236 p. Y 4.Ag 4/2:St 4 S/N 052-070-04319-9 $ 3.25

___Briefing on the Proposed Public Broadcasting Financing Act of 1978.
1978. 93 p. il.
Y 4.In 8/4:P 96/28 S/N 052-070-04440-3 2.10

___Behind the Scenes: Equal Employment Opportunity in the Motion Picture Industry, A Report Prepared by the California Advisory Committee to the United States Commission on Civil Rights. 1978. 48 p.
CR 1.12:Em 7/12 S/N 005-000-00178-1 2.30

Broadcasting Stations of the World. *All missing parts are out of print.*

___ Part 3, Frequency Modulation Broadcasting Stations. *Gives frequency modulation broadcasting stations alphabetically by country and city and by frequency in ascending order.* Rev. 1974. 216 p.
PrEx 7.9:974/pt.3 S/N 041-005-00011-4 2.40

___ Part 4, Television Stations. *Lists television stations alphabetically by country and city and by frequency in ascending order.*
Rev. 1974. 444 p.
PrEx 7.9:974/pt.4 S/N 041-005-00012-2 4.25

___Cable Television: A Handbook for Decision Making. 1973. 229 p. il.
NS 1.20:T 23 S/N 038-000-00154-0 2.40

___ Summary Overview for Local Decision Making. 1973. 15 p.
NS 1.20:T 23/summ. S/N 038-000-00155-8 .55

Code of Federal Regulations, Title 47, Telecommunication:

___ Part 0-19. Revised October 1, 1978. 592 p.
GS 4.108:47/pt.0-19/978 S/N 022-003-93572-0 $ 5.00

___ Part 20-69. Revised October 1, 1978. 829 p.
GS 4.108:47/pt.20-69/978 S/N 022-003-93573-8 5.75

___ Part 70-79. Revised October 1, 1978. 664 p.
GS 4.108:47/pt.70-79/978 S/N 022-003 93574-6 5.25

___ Part 80-End. Revised October 1, 1978. 938 p. il.
GS 4.108:47/pt.80-end-48/978 S/N 022-003-93575-4 7.00

___ Communications Act of 1934, Section 214, Legislative Background.
1979. 96 p. Y 4.In 8/4:C 73/25 S/N 052-070-05015-2 3.00

___ Communications Act of 1934, With Amendments and Index Thereto, Recapped to January 1969. *Contains Packets 1 through 5 and the Administrative Procedure Act, the Judicial Review Act, and selected sections of the Criminal Code Pertaining to Broadcasting.* 1971, reprinted 1976.
142 p. CC 1.5:C 73/969 S/N 004-000-00264-4 3.00

___ Amendment 6 to the above. *This packet revises both the Commications Act of 1934 and the Communications Satellite Act of 1962, which were last updated in January 1969.* 1974. 68 p.
CC 1.5:C 73/969/amdt.6 S/N 004-000-00289-0 1.25

Communications Act of 1978, H.R. 13015, Hearings Before the House, Committee on Interstate and Foreign Commerce:

___ Volume 1. 1979. 696 p.
Y 4.In 8/4:95-194 S/N 052-070-04848-4 5.25

___ Volume 2, Part 1. 1979. 1196 p.
Y 4.In 8/4:95-195 S/N 052-070-04985-5 11.00

___ Volume 2, Part 2. 1979. 1172 p.
Y 4.In 8/4:95-196 S/N 052-070-04986-3 11.00

___ Volume 3. 1979. 1320 p.
Y 4.In 8/4:95-197 S/N 052-070-04987-1 12.00

___ Volume 4. 1979. 360 p.
Y 4.In 8/4:95-198 S/N 052-070-05001-2 6.00

___ Communications Act of 1979, A Bill to Establish Certain Requirements Relating to Interstate and Foreign Telecommunications, and for Other Purposes. 1979. 238 p.
96-1:H.R.3333 S/N 052-071-00587-1 4.25

___ Communications Act Amendments of 1979, S. 611. 1979. 116 p.
96-1:S.611 S/N 052-071-00578-1 2.75

___Communications Act of 1979, Section by Section Analysis. 1979.
96 p. Y 4.In 8/4:C 73/24 S/N 052-070-04924-3 $ 2.20

___Communications, Challenge/Response, Part of the Continuing American Revolution. *Discusses enlarging and improving the communications media available to citizens.* 1976. 25 p.
HH 1.62:C 73 S/N 023-000-00343-1 .75

___Edible TV: Your Child and Food Commercials. *In 1975, the moderate TV-watching child saw between 8,500 and 13,000 food and beverage commercials. A survey of food commercials conducted that same year found that almost 70 percent of the commercials were devoted to products high in fat, saturated fat, cholesterol, sugar, or salt. And recent research leaves little doubt that television advertising implants food consumption values in children and ultimately affects the choices of their parents as well. Drawing on testimony presented before the Federal Trade Commission "Edible TV" discusses the problems associated with food commercials directed at children and reports on a developmental study of the use of graphics in conveying nutritional information.* 1977.
88 p. Y 4.N 95:C 43/2 S/N 052-070-04243-5 1.90

___FCC Decisions Interpreting the Communications Act of 1934: An Index, Volume 1, A Thru I, Volume 2, J Thru Z. *This publication is a subject index of decisions reported in: FCC Reports 1st Series, Volume 25-45 and FCC Reports 2d Series, Volume 1-62. Each subject is cross indexed by references to the United States Code and the Code of Federal Regulations along with references to the appellate reviews of the Courts of Appeals and the Supreme Court.* 1978. 882 p. 2 volumes, sold as a set.
C 1.60/2:78-18/v.1-2 S/N 003-000-00533-0 8.25

Federal Communications Commission Reports, 1st Series. *All volumes are clothbound.*

___ Volume 40, Sponsorship Identification, Equal Time, Fairness Doctrine, FM Frequency Allocations, July 1, 1965. 1970. 1173 p.
CC 1.12:40 S/N 004-000-00247-4 13.05

___ Volume 41, Television Matters, September 1, 1950 to June 30, 1965. 1970. 1234 p. il., map.
CC 1.12:41 S/N 004-000-00243-1 17.00

___ Volume 44, Broadcast Services and Miscellaneous Documents, Part 1, October 13, 1954 to April 14, 1959; Part 2, February 18, 1959 to May 25, 1962. 1972. 3356 p. 2 volumes, sold as a set.
CC 1.12:44/pt.1-2 S/N 004-000-00282-2 32.00

___ Volume 45, Broadcast Services and Miscellaneous Documents, Part 1, May 29, 1962 to February 17, 1964; Part 2, February 24, 1964 to July 26, 1965. 1972. 2788 p. 2 volumes, sold as a set.
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Federal Communications Commission Rules and Regulations. *Subscription service of each Volume listed below includes supplementary material for an indeterminate period. In looseleaf form, punched for 3-ring binder.*

___ Volume I. *Contains FCC Parts: 0, Commission Organization; 1, Practice and Procedure; 13, Commercial Radio Operators; 17, Construction, Marketing, and Lighting of Antenna Structures; 19, Employee Responsibilities and Conduct.* June 1977. Subscription price: Domestic - $14.00; Foreign - $17.50. [FCV01] (File Code 1D)
CC 1.6/1:977

___ Volume II. *Contains FCC Parts: 2, Frequency Allocations and Radio Treaty Matters; General Rules and Regulations; 5, Experimental Radio Services (other than Broadcast); 15, Radio Frequency Devices; 18, Industrial, Scientific, and Medical Equipment.* August 1976. Subscription price: Domestic - $12.50; Foreign - $15.75. [FCV02] (File Code 1D) CC 1.6/2:976

___ Volume III. *Contains FCC Parts: 73, Radio Broadcast Services; 74, Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services.* 1976. Subscription price: Domestic - $30.00; Foreign - $37.50. [FCV03] (File Code 1D)
CC 1.6/3:976

___ Volume VII. *Contains FCC Parts: 21, Domestic Public Radio Services (other than Maritime Mobile); 23, International Fixed Public Radio-Communication Services; 25, Satellite Communications.* March 1974. Subscription price: Domestic - $7.70; Foreign - $9.65. [FCV07] (File Code 1D) CC 1.6/7:974

___ Volume VIII. *Contains FCC Parts: 31, Uniform System of Accounts for Class A and Class B Telephone Companies; 33, Uniform System of Accounts for Class C Telephone Companies.* 1978. Subscription price: Domestic - $5.10; Foreign - $6.40. [FCV08] (File Code 1D)
CC 1.6/8:978

___ Volume XI. *Contains FCC Parts (formerly contained in Volume III): 76, Cable Televisions; 78, Cable Television Relay Service.* Subscription price: Domestic - $8.60; Foreign - $11.00. [FCV11] (File Code 1D) CC 1.6/11:976

Industrial Reorganization Act, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, On S. 1167, Senate, 94th Congress, 1st Session and 93d Congress, 2d Session:

___ Part 2, The Communications Industry, July 30, 31, August 1 and 2, 1973. p. 497-1771, il.
Y 4.J 89/2:In 2/15/pt.2 S/N 052-070-02262-1 $ 9.35

___ Part 5, The Communications Industry, June 20, 21, 25, and 27, 1974. 1974. p. 2735-3836, il.
Y 4.J 89/2:In 2/15/pt.5 S/N 052-070-02545-0 9.80

Industrial Reorganization Act, Hearings . . . con.

___ Part 6, The Communications Industry, July 9, 30, and 31, 1974. 1974. p. 3837-4832, il.
Y 4.J 89/2:In 2/15/pt.6 S/N 052-070-02655-3 $ 9.00

___International Communications and Information, Hearings Before the Subcommittee on International Operations of the Senate Committee on Foreign Relations, On the Implications of International Communications and Information, 95th Congress, 1st Session, June 8, 9, and 10, 1977. 1977. 286 p. il.
Y 4.F 76/2:C 73/7 S/N 052-070-04210-9 3.25

___Media. *A guide to assist in setting up a workshop on women and the mass media by the National Commission on the Observance of International Women's Year.* 1977. 55 p.
Y 3.W 84:10/12 S/N 052-003-00491-7 1.25

___Movie Ratings and the Independent Producer, A Report. 1978. 142 p. il. 95-2:H.rp.996
S/N 052-071-00559-5 2.40

___Negotiation and Statecraft, Hearings Before the Permanent Subcommittee on Investigations of the Senate Government Operations Committee, Pursuant to Section 4, S.Res. 49, Senate, 94th Congress, 1st Session, Part 4, With Panel on the International Freedom to Write and Publish, November 18, 1975. 1975. p. 151-299.
Y 4.G 74/6:N 31/11/pt.4 S/N 052-070-03176-0 2.20

___New Directions in Mass Communications Policy: Implications for Citizen Education and Participation. *Contents of publication: Communications today; The System of freedom of expression; Social science research on the media, Audience and public information; Minorities and the media; Public broadcasting; Television: violence and children's programming; Public service advertising, Advocacy advertising, Free speech messages; The Communications Act of 1978; Communication technologies; The Communication system and the future.* 1979. 34 p.
HE 19.102:C 49/4 S/N 017-080-01998-1 1.60

___Options Papers. *Discusses policy options for spectrum resource, broadcasting, safety, special, and mobile radio communications, domestic communications, common carriers, international telecommunications, cable TV regulations and regulations of telecommunications.* 1977. 664 p.
Y 4.In 8/4:P 19/27 S/N 052-070-04043-2 6.00

___Printing and Publishing: Quarterly Industry Report. *Presents summary materials on trends in the printing and publishing industry.* Subscription price: Domestic - $5.00 a year; Foreign $6.25 a year. Single copies may be purchased from the U.S. Department of Commerce, Washington, D.C. 20230 or the Department of Commerce Field Offices. [CIRP] (File Code 2Q) C 57.510:

___Purchasing a Broadcast Station: A Buyer's Guide. *Reprinted from material prepared and copyrighted in May 1978 by the National Association of Broadcasters.* 1979. 38 p.
CC 1.7/4:B 78/2 S/N 004-000-00363-2 2.00

___Radio Laws of the United States, June 24, 1910-November 2, 1978.
1978. 316 p. Y 1.2:R 11/978 S/N 052-001-00148-6 $ 4.25

___Report on Survey of Users of the Services of Radio Stations WWV and WWVH, 1975. 1975. 90 p.
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___Research on the Effects of Television Advertising on Children: A Review of the Literature and Recommendations for Future Research. *This book assesses the current state of knowledge about the effects of television advertising on children, and recommends a plan of future research to fill gaps in that knowledge.* 1977. 229 p. il.
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___Role of Private Foundations in Public Broadcasting, Hearings Before the Committee on Finance, Subcommittee on Foundations, Senate, 93d Congress, 2d Session, September 9 and 10, 1974. 1974. 153 p.
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___Social Services and Cable TV. 1976. 212 p. il.
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___Special Report, Analysis of Subpoenaed Television Data. 1978.
41 p. il. Y 3.C 76/3:17-2 T 23 S/N 052-011-00179-1 1.60

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___ Gannett Versus DePasquale. *Deals with defendants requesting the public and press be excluded from a hearing so as to avoid adverse publicity.* 1979. 84 p.
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___Televised Advertising and the Elderly, Hearing Before the Select Committee on Aging, House, 95th Congress, 2d Session, January 26, 1978. 1978. 274 p. il.
Y 4.Ag 4/2:Ad 9/2 S/N 052-070-04571-0 3.50

___Televising the House, Communication From the Chairman, Select Committee on Congressional Operations to the Speaker of the House of Representatives, Transmitting the Report of the Select Committee on the Conduct of the 90-day Test of Broadcast Coverage of the Daily Floor Proceedings of the House, Together With Recommendations for the Future of Broadcast Coverage, September 27, 1977. 1977. 69 p. il.
95-1:H.doc.231 S/N 052-070-04256-7 1.90

___Television Advertising to Children. *Discusses petitions from Action for Children's Television, and Center for Science in the Public Interest, requesting the promulgation of a trade rule regulating television advertising of candy and other sugared products to children.* 1978. 365 p.
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___Television and Social Behavior, Reports and Papers, A Technical Report to the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, Volume 3, Television and Adolescent Aggressiveness. 1972. 435 p. il.
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